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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

DENNIS LOFTUS, LAWRENCE WHEAT, WILLIAM PRYZLUCKI,
EARL LeCLAIR, PETER DeMARCO, RICHARD CARBANO, RICHARD
WISNOSKI, PAUL LITWIN, BREWERY WORKERS PENSION FUND
BY ROCCO F. DePERNO, PAUL E. BUSH, JACK CANZONERI, T.
EDWARD NOLAN, CURTIS GUNDERSON and RICHARD MULLER,
Successor Trustees and Plan Administrator of the Brewery Workers Pen-
sion Fund and NEW YORK STATE TEAMSTERS CONFERENCE PEN-
SION AND RETIREMENT FUND BY ROCCO F. DePERNO, PAUL
E. BUSH, JACK CANZONERI, T. EDWARD NOLAN, CURTIS
GUNDERSON and RICHARD MULLER, Trustees and Plan Administrator
of the New York State Teamsters Conference Pension and Retirement
Fund,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, and JOHN HOH, KEN-
NETH CARROLL, ANTHONY GRAU and ANGELO FERRARO, Former
Trustees of the Brewery Workers Pension Fund,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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QUESTIONS PRESENTED

1. Can the United States Tax Court lawfully deprive an entire class of persons, plan participants, of its statutory right to judicial review of the IRS Commissioner's determinations concerning its pension plan where that class has met all statutory requirements for such review?

2. Does Internal Revenue Code Section 7476 provide for Tax Court jurisdiction over petitions challenging the Commissioner's determination or failure to make a determination with respect to the continuing qualification of retirement plans where petitioners are interested parties and the Internal Revenue Service has established that all jurisdictional prerequisites have been met?

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CITATIONS OF THE OPINIONS BELOW

Loftus v. Commissioner, 90 T.C. 845 (1988), *New York State Teamsters v. Commissioner*, 90 T.C. 862 (1988), aff'd decision without published opinions *Loftus v. C.I.R.*, 872 F 2d 1021, *NYS Teamsters v. C.I.R.*, 872 F 2d 1021 (2nd Cir. 1989).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was dated and entered on January 25, 1989. Petitioners timely filed a petition for rehearing and suggestion for rehearing *en banc*. On March 20, 1989, the United States Court of Appeals for the Second Circuit denied the petition for rehearing. On May 19, 1989, Justice Marshall signed an order extending the time for filing this petition for certiorari to and including July 17, 1989. On July 11, 1989, Justice Marshall signed an order extending the time for filing this petition for certiorari to and including August 17, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1331.

STATEMENT OF THE CASE

In the early 1970's, representatives of the Brewery Workers Fund (Brewery Fund), a multi-employer plan covering employees of a number of brewery firms, approached representatives of the New York State Teamsters Conference Pension and Retirement Fund (NYS Fund) with a proposal to combine the two plans.¹

¹The NYS Fund, in existence since the mid-1950's, is a multi-employer pension plan pursuant to Section 3(37) and 4001(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), Sept. 2, 1974 P.L. 93-406, 88 Stat. 839, 29 U.S.C. Section 1001. As of December 31, 1972, the plan had 25,671 active participants, 1,249 pensioners and net assets of \$90,900,736.00. The Brewery Fund, in existence from June 1967 to December 1, 1976, was a separate multi-employer pension plan. As of December 31, 1972, the Brewery Fund had 5,156 active participants, 2,206 pensioners and net assets of \$21,249,940.00. By September 30, 1976, the Brewery Fund's active participants had fallen by 73% and employer contributions decreased by 61%. However, the number of pensioners had increased by 54% and the amount of pension payments had risen from \$4,158,388.00 to \$8,324,844.00. The Brewery Fund was insolvent prior to the effective date of the merger on December 1, 1976.

An agreement and plan of integration to merge the Brewery Fund into the NYS Fund was executed by the trustees of both funds. The integration agreement was expressly conditioned upon receipt of a tax ruling by the Internal Revenue Service (IRS) qualifying the integration for favorable tax treatment. The integration Agreement was not to take effect until 30 days after receipt of IRS approval.

In 1974, prior to the filing of an application for IRS approval, the NYS Fund trustees learned through a newspaper account that one of the largest contributing employers in the Brewery Fund was closing its New York City brewery. Fearful that this development would severely jeopardize the benefits which pensioners and participants in the NYS Fund had built up over the years, the trustees of the NYS Fund notified the Brewery Fund trustees that the NYS Fund could not proceed with the proposed merger.

The Brewery Fund trustees, through litigation, began to press for specific performance of the integration agreement. The Brewery Fund trustees were especially anxious to put the integration agreement into effect because they knew the Brewery Fund would soon be actuarially insolvent and confronted with 70 million dollars of unfunded liability. The vast unfunded liability was anticipated because the two major employer-contributors to the Brewery Workers Fund, F&M Schaefer Brewing Company and Rheingold Breweries, Inc., which contributed approximately 80% of the funding, would be closing their New York City breweries within a matter of months.

In April 1976, NYS Fund representatives met with IRS officials to inform IRS of the integration agreement. They discussed with the IRS the estimated unfunded liability of the Brewery Fund and the serious ramifications that the integration of the two Funds would have upon the NYS Fund, such

as eventual reduction of benefits or termination. The IRS advised that an application for an advance determination regarding the proposed merger would not be acted upon because, *inter alia*, the Pension Benefit Guaranty Corporation (PBGC) had not issued applicable regulations for mergers of multi-employer plans to reflect changes made by ERISA. The NYS Fund, in reliance upon the representations made by the IRS, thus refrained from taking further steps to seek IRS approval or disapproval of the integration agreement.

However, unbeknownst to the NYS Fund, and purportedly not to the knowledge of the IRS representatives who met with the NYS Fund in April, 1976, the Brewery Fund had that March filed an unauthorized application seeking IRS approval of the integration agreement. Significantly, the application identified the NYS Fund as the applicant, when it was not. The application had been submitted unsigned and without either a Power of Attorney (from the NYS Fund) or the knowledge, consent, or authorization of the NYS Fund.²

The Brewery Fund's unauthorized application to the IRS was not filed in accordance with the requirements of Section 7476 and Section 3001(a) of ERISA which mandates that all "interested parties" be notified of the filing of the application. In addition, conspicuously absent from the Form 5303 request filed by the Brewery Fund was a response to item 6(b) asking the applicant to declare that all "interested parties" have in fact been notified of the filing. No notice had in fact been provided to interested parties in the NYS Fund.

At no point before the IRS issued a Determination Letter were the trustees of the NYS Fund or their representatives aware that the application was pending before the IRS. No

²Brewery Workers' counsel submitted an *unsigned* application that made it appear to the IRS that the NYS Fund was the applicant.

opportunity was ever provided for the submission of comments from either the trustees of the NYS Fund or any plan participant or interested party of the NYS Fund in connection with the filing and processing of the application, as required by ERISA and the Code.³

³In a technical advice memorandum, the Internal Revenue Service acknowledged the seriousness of the Brewery Fund's lack of notification.

By memorandum, dated August 10, 1977, the Assistant Commissioner (Employee Plans and Exempt Organizations), Attention: Director, Employer Plans Division, forwarded a proposed National Office Technical Advice Memorandum (TAM) for review by Chief Counsel's Interpretative Division. The proposed TAM essentially dealt with whether the September 28, 1976, Determination Letter approving the integration agreement should be withdrawn or revoked for failure to notify interested internal parties of the determination letter application, as required by ERISA.

In GCM 37682, Chief Counsel's Interpretative Division noted that the integration had by that time occurred. Rather than upset the integration prematurely, the GCM reasoned that it would be better not to withdraw or revoke the Determination Letter *immediately* (emphasis added). Instead, in recommending that interested parties be permitted to "comment" on the issuance of the Determination Letter, GCM 37682 stated:

Although we do not envision that this will require immediate withdrawal of the favorable determination letter, on the basis of the comment received *the letter may have to be withdrawn or retroactively revoked*.. (Emphasis added)

However, in May, 1979, the District Director who had issued the original determination letter advised *mirabile dictu* each interested party by form letter as follows:

After carefully reviewing the facts and circumstances in this case, and your comments, we have determined that the favorable determination letter issued on September 28, 1976 was proper under the Internal Revenue Code and the rules and regulation issued thereunder.

In *Wenzel v. Commissioner*, 707 F.2d 694 (2nd Cir. 1983), the Second Circuit Court of Appeals found, *inter alia*, that:

no sound reason has been advanced for the Commissioner's taking two years to issue Technical Advice (October 25, 1978) to the effect that Notice of the March 8, 1976 request for a determination should have been given to the NYS Fund.

On September 28, 1976, the IRS issued a determination letter approving the integration agreement between the Funds.

At the behest of the Brewery Fund, the Supreme Court of the state of New York, County of Queens, on April 12, 1977, entered a judgment declaring that "the Brewery Workers Pension Fund is now and has been since December 1, 1976 fully integrated with the New York State Teamsters Conference Pension and Retirement Fund." *Brewery Workers Pension Fund v. New York State Teamsters Conference Pension and Retirement Fund*, Index No. 9997/74 (Calabretta, J., April 12, 1977). An appeal by the NYS Fund trustees was unsuccessful. *Brewery Workers Pension Fund v. New York State Teamsters Conference Pension and Retirement Fund*, 62 A.D. 2d 1046 (1978).

In accordance with the order of the New York State Supreme Court, the NYS Fund trustees have continuously provided pension benefits to all participants of the integrated pension plan, including specifically those individuals who had been participants in the Brewery Fund prior to the integration.⁴ Nonetheless, the NYS Fund trustees have continued to challenge the validity of the merger in a series of actions before agencies and courts.⁵

⁴Although the assets and liabilities were consolidated under the Court order, the Trustees of the NYS Fund received and administered the assets of the Brewery Workers Fund as a separate division of the NYS Fund (the "Brewery Workers Fund Division"), pending the outcome of continuing litigation and administrative proceedings. Assets of the Brewery Workers Fund Division were exhausted in May of 1979 and the NYS Fund currently is paying approximately \$700,000.00 more in benefits each month to pensioners and beneficiaries of the Brewery Workers Fund Division than it receives from contributing employers to the Brewery Workers Fund Division.

⁵For example, the NYS Fund trustees filed suit in the United States District Court for the District of Columbia seeking to compel the Pension Benefit Guaranty Corporation ("PBGC") to intervene and disap-

The Prior Tax Court Litigation

The NYS Fund trustees appealed the September 28, 1976 IRS decision that the integrated plan was still tax qualified to the Tax Court. The appeal was based on a number of procedural grounds and on the ground that a "partial termination" of the Brewery Fund took place prior to December 1, 1976, and caused the Brewery Fund to lose its tax qualified status. The Tax Court held, *inter alia*, that: there were no determinations outstanding that were reviewable under Section 7476; that "admitted procedural irregularities" by the Internal Revenue Service in issuing the Determination Letter did not constitute a reviewable issue under Section 7476; and, that the partial termination challenge was essentially not ripe, given that the IRS had not yet ruled on whether such partial termination had indeed taken place. See *New York State Teamsters Conference Pension and Retirement Fund, William H. Mosley, Sr., Administrator v. Commissioner, et al.*, T.C. Memo 1982-594. That decision was appealed. *Wenzel v. Commissioner*, 707 F. 2d 694 (2nd Cir 1983).

In *Wenzel*, the Second Circuit Court of Appeals affirmed the Tax Court, but made certain recommendations:

Accordingly we urge that in the event of further proceedings the Commissioner and the parties, in the interest of avoiding further loss of public confidence and esteem, give top priority to a prompt

prove the integration. The district Court and ultimately the District of Columbia Circuit dismissed the suit on the ground that, "the federal court lacks subject matter jurisdiction [to consider the integration and related claims] due to the fact that the execution and repudiation of the integration agreement occurred prior to the effective date of ERISA." *New York State Teamsters Conference Pension and Retirement Fund v. P.B.G.C.*, 591 F.2d 953, 957 (D.C. Cir. 1979). Accordingly, Section 14(b)(1) of ERISA was held to preclude the trustees' claim. *Id.*

determination of the issue of whether there was a partial termination of the Brewery Workers Fund.

Apparently, the Second Circuit Court of Appeals contemplated future activity with respect to the challenge of the integration before the IRS.⁶

The Determinations at Issue in This Proceeding

Following dismissal of the earlier Tax Court case, numerous participants and the NYS Fund followed the procedures outlined by the Second Circuit, and sought an IRS ruling on the issue of partial termination of the pre-integration Brewery Fund. These participants and the NYS Fund on behalf of all participants, trustees of the integrated Fund and successor trustees of the Brewery Fund applied to the IRS, on September 30, 1983, to obtain determinations with respect to the qualified status of the Brewery Fund and, separately, with respect to the qualified status of the integrated NYS Fund.

On February 12, 1985, the IRS issued a determination letter regarding the pre-integration Brewery Fund. That letter determined that the pre-integration Brewery Fund had suffered a partial termination before the effective date of the integration. The letter also determined, contrary to petitioners' request, that the partial termination had no effect on the Brewery Fund's qualified status.⁷ (App. 70a)

⁶Neither the Second Circuit's holding in *Wenzel*, nor that of the Tax Court which it affirmed, would have prevented the Tax Court from granting the declaratory relief sought in the present proceedings. See App. 53a, Note 2, IRS Memo.

⁷That determination spawned yet another lawsuit by different parties. There, the Plaintiffs, certain participants in the NYS fund, sued the trustees of the NYS Fund for breach of their fiduciary duty in *Baum v. Nolan*, 853 F.2d 1071 (2nd Cir. 1988). The plaintiffs contended that the trustees had the right and obligation, upon receipt of the 1985 IRS determination that

The IRS, however, failed to issue any determination letter pertaining to the application for a determination with respect to the integrated NYS Fund, even though both the participants' application and the IRS' most recent technical advice memorandum addressed the integrated NYS Fund and the pre-integration Brewery Fund separately.

Petitioners instituted these proceedings pursuant to I.R.C. Section 7476 in response to the IRS' adverse determination letter with respect to the pre-integration Brewery Workers Fund and its failure to respond at all to the participants' and NYS Fund's requests for a determination with respect to the integrated NYS Fund. All that participants are requesting is that they be given the opportunity to be heard and have their determination be given judicial review, as provided by statute.

The allegations of each of the petitioners are explicit with respect to the jurisdictional issues involved, *viz.*, questioning a determination with respect to the continuing qualification of a retirement plan, and the failure to make a determination with respect to such continuing qualification, where the controversy arises from a plan amendment or plan termination, in accordance with Section 7476 (a)(1) and (2). The petitions were consolidated into two sets of cases, one set pertaining to the pre-integration Brewery Fund and one set pertaining to the integrated NYS Fund. Trustees of the Brewery Fund filed a motion to dismiss for lack of jurisdiction. The Commissioner opposed this motion on the grounds that IRS recognized that

a partial termination of the Brewery Fund occurred prior to September 1976, to terminate the Brewery Fund. The Second Circuit ruled, in affirming dismissal of that lawsuit because it found that the trustees had no such duty, that, "a plan's treatment of partial termination has consequences for its tax status and partial termination is itself a reportable event under ERISA." (emphasis added) *Id.* at 1075.

App. references refer to the pages of the appendix in the petition.

the Tax Court had jurisdiction and that the petitioners had standing. Specifically, the Commissioner established that plan participants constitute an "interested party" entitled to judicial review under the statute.

The Tax Court Opinion

Special Trial Judge Panuthos, whose opinion was adopted by a single sitting judge of the Tax Court, in 90 T.C. 845 (1988) and 90 T.C. 862 (1988), (App. 1a) examined both sets of cases and found a lack of jurisdiction and a lack of standing. Specifically, the Special Trial Judge concluded that an "actual controversy" does not exist; that participants in the NYS Fund are not "interested parties" even though they are employees with accrued benefits who may be affected by the integration; and that the trustees and plan administrators of the NYS Fund are not proper parties to request declaratory relief with respect to a determination as to the status of the pre-integration Brewery Fund despite their responsibilities as successor trustees.

The Second Circuit, in a non-published order, briefly affirmed the opinion and order of the special trial judge. After deliberating for more than two months, the Second Circuit denied petitioners' request for rehearing *en banc*. In their petition for writ of certiorari, participants seek, pursuant to Section 7476, a review by the Tax Court of the Commissioner's 1985 determination letter.

SUMMARY OF ARGUMENT

The decision by the Special Trial Judge of the U.S. Tax Court to dismiss *Loftus v. C.I.R.* and *NYS Teamsters v. C.I.R.*, 90 T.C. 845 (1988) and 90 T.C. 862 (1988), a decision that was affirmed by a *per curiam* order of the United States Court of

Appeals for the Second Circuit, disenfranchises an entire class of persons, plan participants, of its congressionally mandated right to challenge the IRS Commissioners's determinations concerning its retirement plan. Though acutely, immediately and continuously injured by the Commissioner's action, these plan participants are left without recourse for justice. That these plan participants have a legal right to challenge the Commissioner's ruling was at once recognized and supported by the Commissioner of Internal Revenue in its own submission to the Tax Court.

Yet, without sufficient reason or valid rationale, these plan participants are being denied their statutory right under 26 U.S.C. Section 7476 to a hearing on the merits of their case, jeopardizing the long accumulated benefits these plan participants will depend on as a principal source of income during their retirement years. No other class of persons has been harmed in this way. Congress expressly recognized the need to consider the independent interests of plan participants in rulings affecting their benefits, through its enactment of the declaratory judgment relief provision of Section 7476. The IRS established in the Tax Court that these participants meet all the jurisdictional and standing requirement entitling them to Section 7476 declaratory judgment review. Yet, the Special Trial Judge of the Tax Court overlooked the IRS support for plan participants' plea for a hearing on the merits. He did so even though plan participants were deprived of an opportunity to comment on the IRS determinations regarding their pension plan.

The interpretation of the Tax Court Special Trial Judge falls outside the purview of the statute. It is neither within the literal language or the spirit of the statute.

More significantly, the Special Trial Judge's cavalier dismissal of this case has had and continues to have extremely grave

ramifications. The misconceived dismissal has caused an entire class of plan participants to be denied its statutory right to judicial review of the determination and to be deprived of its day in court. In addition, as the record demonstrates, the participants have so far been damaged in the amount of more than seven million dollars in irrevocable payments from their retirement plan and each year the total increases by more than \$700,000. Elemental precepts of due process, along with the congressionally mandated cause of action, operate to guarantee the participants' right to have legal review over the distribution of such sizable assets. Moreover, the Tax Court decision, affirmed by the Second Circuit, has seriously eroded the law concerning the right of pension plan participants to obtain judicial review of IRS determinations pursuant to Section 7476, a right guaranteed by ERISA.

The dismissal of the participants' pleas for judicial review is an untoward and flagrant departure from the established pattern of administrative and judicial relationships. Only this Court now can clarify and uphold the law and ensure that the Tax Court does not abdicate its responsibility to decide the legal merits of this controversy and offers petitioners a fair opportunity to present their case.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED

- A. An entire class of persons has been unlawfully disenfranchised of its right to judicial review of the Internal Revenue Service Commissioner's determination affecting its pension plan.**

The tacit approval by the Second Circuit Court of Appeals of the decision of the Special Trial Judge of the United States Tax Court to dismiss *Loftus v Commissioner*, 90 T.C. 845 (1988) and 90 T.C. 862 (1988) disenfranchises an entire class of persons, plan participants, of its congressionally mandated right to challenge the IRS Commissioner's determinations affecting its retirement plan. Although acutely, immediately and continuously injured by the Commissioner's administrative action, these plan participants are left without recourse for justice. They are being denied their statutory right under 26 U.S.C. 7476 to challenge the Commissioner's determination with respect to their plan. That these plan participants have a legal right to challenge the Commissioner's ruling is so blatantly evident that the Commissioner of Internal Revenue recognized and supported petitioners' position as to jurisdiction in its own submission to the Tax Court.

Without sufficient reason or valid rationale, these plan participants are being denied their statutory right under 26 U.S.C. Section 7476 to a hearing on the merits of their case. Section 7476 provides in pertinent part as follows:

[39,001.11] CODE SEC. 7476. DECLARATORY JUDGMENTS RELATING TO QUALIFICATION OF CERTAIN RETIREMENT PLANS.

(a) Creation of Remedy. - in case of actual controversy involving

(1) a determination by the Secretary with respect to the initial qualification or continuing qualification of a retirement plan under subchapter D of chapter 1, or

(2) a failure by the Secretary to make a determination with respect to —

(A) such initial qualification, or

(B) such continuing qualification if the controversy arises from a plan amendment or plan termination, upon the filing of an appropriate pleading, the Tax Court may make a declaration with respect to such initial qualification or continuing qualification. Any such declaration shall have the force and effect of a decision of the Tax Court and shall be reviewable as such.

The Tax Court's decision to deprive these plan participants of a hearing on the merits jeopardizes the long accumulated retirement benefits which these plan participants will depend on as a main source of income during their retirement years. Each day the retirement fund of both workers and pensioners is unjustly being depleted of tens of thousands of dollars in irrecoverable payments. Furthermore, the Tax Court ruling, if upheld, shields the IRS from any judicial review of this determination and failure to make a determination, robbing these participants of their statutory right. Elemental precepts of due process, along with the congressionally mandated cause of ac-

tion, operate to guarantee the participants' rights to have legal review over the distribution of such sizeable assets.

B. I.R.C. Section 7476 expressly provides declaratory judgment jurisdiction for plan participants seeking review of IRS determinations.

“There is no surer guide in the interpretation of a statute than its purpose when that is sufficiently disclosed...”

Judge Learned Hand

F.D.I.C. v. Tremaine, 133 F.2d 827, 830
(2nd Cir. 1943).

Congress was purposeful and clear in its objective in creating Section 7476. Congress expressly recognized the need to consider the independent interests of plan participants in rulings affecting their benefits. As a consequence, it mandated declaratory judgment relief, by enacting Section 7476. Under prior pension law, with which Congress was dissatisfied, employees were not able to obtain judicial review to protect their interests. Congress aimed to remedy circumstances in which plan participants or sponsors, even though they disagreed, were forced to go along with the determination made by the IRS, by providing for judicial review of the IRS' administrative decision.

The legislative history of Section 7476 conclusively demonstrates that Congress was concerned that plan participants, for whom the retirement plans were designed, had no voice and therefore enacted the statute to give them one.

In addition, the determination letter procedure does not permit employees, or their unions to question the qualification.

The committee believes that other employers and employees should have a right to court adjudication in the situation(s) described above." (emphasis added)

S. Rep. No. 383, 1st Sess., 93rd Congress, 113 (1973)

In other words, "a neutral arbiter was needed to insure that the legislative policy according favored tax treatment to retirement plans established for the exclusive benefit of employees would not be inhibited by disputes which could not be resolved in an appropriate and expedient manner through the administrative process." 44 J. OF TAX'N. 90 (1976). Congress thus provided that an interested party who "questions a Service determination with respect to the qualification of a particular plan. . . may petition the Tax Court to issue a declaratory judgment as to the status of the plan." S. Rep. No. 383, *supra* at 113.

This Court has pointed out how significant the declaratory judgment procedures under Section 7476 are and has decreed that "great weight" be given to such statutory provisions. *South Carolina v. Regan*, 465 U.S. 367 (1984).

If the Tax Court's narrow and constrictive reading of Section 7476 is permitted to stand, it would eviscerate the Section 7476 provision. Moreover, it would result in a grave miscarriage of justice, by leaving plan participants without a remedy and without any process to have participated in the qualification determination.

Congress carved out Section 7476, then, to require that an action for declaratory judgment should exist where the continuing qualification of a pension plan is at issue. By providing declaratory judgment relief, Congress acted both to protect the rights of participants by giving them a means to openly

appeal and thus participate in the determination process and, by way of checks and balances, to force the IRS determination to be subjected to judicial scrutiny. A solid legal right was thus created for pension plan participants when Congress provided the Section 7476 remedy for the adjudication of plan participants' rights. As this Court so eloquently pronounced:

"To reach the dignity of a legal right it must appear from the nature and character of the legislation that Congress intended to create a statutory privilege protected by judicial remedies."

Stark v. Wickard,
321 U.S. 288 (1983).

The Section 7476 remedy establishes such a legal right.

Even more significantly, the dismissal of the participants' plea for judicial review is an untoward and flagrant departure from the established pattern of administrative and judicial relationships. As this Court so aptly opined:

"Such a sweeping contention for administrative finality is out of harmony with the general legislative pattern of administrative and judicial relationships."

U.S. v. I.C.C., 337 U.S. 426 (1946)

Congress clearly set out to secure the remedy of judicial review for plan participants. Yet, at no point in these proceedings to date, have participants been afforded this opportunity for judicial review of the IRS Commissioner's determination.

The Special Trial Judge of the Tax Court's dismissal is antithetical to the intent of Congress in enacting the Employee Retirement Income Security Act of 1974 (ERISA), P.L. 93-406, 88 Stat. 839, 29 U.S.C. Section 1001. ERISA established a comprehensive and consistent federal pension supervisory scheme. The Section 7476 declaratory relief provision was not

a Congressional afterthought or remedial piece of legislation. The Section 7476 provision is an integral and vital part of the very fabric of ERISA, the regulatory scheme created by Congress to promote fairness to pension plan participants and to open the doors to greater participation by pension plan members and employers, Internal Revenue Code (1954), Sec. 7476, as added by Sec. 1041(a) of the Employee Retirement Income Security Act of 1974, Pub. Law 93-406, 93rd Cong. 2nd Sess, approved Sept. 2, 1974, effective under Sec. 1041(d) of that Act as to pleadings filed after Sept. 2, 1975.

The administrative procedures under ERISA and the declaratory judgment procedure of Section 7476 are an integrated set of procedures which were not intended to be invoked piecemeal. *Federal Land Bank Assoc. v. Commissioner*, 67 T.C. 29 (1976), *rev'd*, 273 F.2d 179 (4th Cir. 1978). The committee report makes this clear:

“This Committee believes that this procedure is desirable because it will permit all interested parties to the controversy (the Government, the trustee, the employer, and his employees) to have an opportunity to participate in the administrative determination of the matter and to have an opportunity to contest the the Service determination of the matter.”

S. Rep. No. 383, *supra* at 113

Based on the plain meaning of the statute there is no question that Congress sought to guarantee judicial review of the Commissioner's determinations on retirement plans. Applying the accepted tenets of statutory construction and interpretation, the clear meaning of the words of this declaratory judgment statute stands in bold relief. Justice Frankfurter, in seeking to encourage reverence for the plain meaning of the words set forth in a statute, noted that:

While Courts are no longer confined to the language,
they are confined by it.

Frankfurter, Some Reflections on the
Reading of Statutes, 47 COLUM. L.
REV. 527 (1947)

Indeed, the Internal Revenue Service recognized the right of plan participants to judicial review of the determination, as IRS explained in its comprehensive submission to the Tax Court. (App. 55a-69a)

Though great deference to interpretation of a statute is normally accorded to the administrative agency charged with its administration, the Special Trial Judge of the Tax Court overlooked the IRS support for plan participants' plea for a hearing on the merits.

The Special Trial Judge's cavalier dismissal of this case has had and continues to have extremely grave ramifications. The misconceived dismissal has caused an entire class of plan participants to be denied its statutory right to judicial review of the Commissioner's determination and to be deprived of its day in court. In addition, the dismissal has mired pension plan participants and advisers in a morass of confusion and skepticism as to the availability of Section 7476 relief and has rendered farcical the intent of Congress by twisting the plain meaning of the statute.

C. The Internal Revenue Service established in the Tax Court that these participants meet all the jurisdictional and standing requirements entitling them to Section 7476 declaratory judgment review.

Despite the general posture of disagreement that prevails between plan participants and the IRS when an IRS pension ruling is challenged, the IRS established indisputably for the

Special Trial Judge that the Tax Court had jurisdiction and that plan participants as interested parties were entitled by law to a review of the IRS Commissioner's determination. IRS demonstrated for the Tax Court that the facts and circumstances of the case at bar meet all the requisite elements for Section 7476 jurisdiction.

The Commissioner of Internal Revenue, opposing dismissal, urged the Tax Court to hear these cases on their merits. The Commissioner explained as follows:

This Court has jurisdiction, pursuant to Section 7476, over only those issues that bear on the qualification of those retirement plans. In general, each of the cases before this Court concerns the qualification under Section 401 of the Brewery Fund or the Teamsters Fund...

(App. 55a)

In dockets nos. 12440-85''R'' through 1244-85 ''R'', the petitioners request the Court to make a declaration concerning whether the partial termination of the Brewery Fund resulted in its disqualification, whether a disqualified Brewery Fund could merge with the Teamsters Fund and have the merged funds be qualified, and whether the merger resulted in the termination and disqualification of the Brewery Fund and, by implication, the Teamsters Fund. They are qualification issues raised in the application and answered in the technical advice memorandum and thus are properly subject to the jurisdiction of this court under Section 7476.

(App. 57a)

The petitioners in consolidated dockets nos. 12445-85''R'' through 12449-85''R'' make a num-

ber of requests for relief as those described above, to which the same jurisdictional analysis applies.

(App. 58a)

[T]hese cases are based at least in part on a determination within the meaning of Section 7476(a)(1). . . Whether the Commissioner made a determination, within the meaning of Section 7476(a)(1), or failed to make a determination, within the meaning of Section 7476(a)(2), respondent believes that any alleged failure to rule on a particular issue does not by itself deprive this Court of jurisdiction. Thus, to the extent that the issue is a "qualification issue" and there exists a case or controversy, this Court has jurisdiction. . .

(App. 61a)

Therefore, there is a case or controversy present as required by Section 7476(a). (App. 65a)

The individuals, as participants in the merged funds of the Teamsters Fund and the Brewery Fund, have an interest in the issue of the Brewery Fund's qualification and the effect that determination may have upon their benefits. Clearly, the successor plan administrator of the Brewery Fund is an eligible petitioner under Section 7476(b)(1).

(App. 66a)

The Teamsters Fund Trustees and administrators have standing as the qualification of the Teamsters Fund and of the merged plans is either addressed by these cases or affected by their outcome.

(App. 67a)

For the reasons stated herein, respondent asserts

that this Court has jurisdiction over each of the 10 petitions. . .

(App. 68a)

The case law history of dismissals for lack of jurisdiction under Section 7476 demonstrates in general that, unless one of the requisite elements for meeting the Section 7476 jurisdictional test is conspicuously absent, the Tax Court, and the Circuit Courts, have been loath to dismiss a case without a hearing on the merits. *Paul C. Jones*, T.C.M. (P-H) 1980-512, aff'd by unpublished order 676 F.2d 710 (9th Cir. 1982), *BBS Associates, Inc.* 74 TC 1118 aff'd by unpublished order (3rd Cir, 7-29-81).

In the case at bar, IRS established that all elements of the jurisdictional test are met. Indeed, the Commissioner's Memorandum to the Tax Court concluded:

Wherefore, respondent (Commissioner) requests the Court to rule that it does have jurisdiction over the petitions filed in theses cases.

(App.69a)

Yet, the Special Trial Judge dismissed the claim of these plan participants without a hearing on the merits.

D. The Tax Court's notion of its jurisdiction is misguided.

The Tax Court erred in ruling that no jurisdiction exists to hear petitioners' plea. In this case, the Tax Court first misapplied the test for jurisdiction, and then later attempted to use the jurisdiction test as a pretext for dismissing the case. The Tax Court reached its erroneous result by miscasting the nature of the controversy and ignoring the IRS position to the contrary.

The Special Trial Judge made the incorrect finding that the 1983 request for a determination was in reality a challenge to the 1976 determination. The Commissioner of Internal Revenue drew no such erroneous conclusion. He set forth the position that this case was a legitimate challenge to his determination that warranted a hearing on the merits and that the Tax Court had jurisdiction to hear the case.

Under Section 7476, the Tax Court is to limit its review to an inquiry as to "whether the Commissioner, in making his determination, properly applied the law to the facts presented to him in the request for such determination." *Thompson v. Commissioner*, 71 T.C. 32, 36-37 (1978). Thus, the scope of the Tax Court's authority provides for an analysis of whether the Commissioner's determination, in view of all the facts and circumstances of the case, was made in accordance with the law. Yet, contrary to the Commissioner's own analysis, the Special Trial Judge wandered far afield and ignored the Commissioner's admission that petitioners' challenge to his determination was reviewable.

The Tax Court, as was noted in a recent opinion, does not have a broad jurisdictional grant to review factual matters in the context of declaratory judgment actions. *Frank Bruce Stephens v. Commissioner*, T.C.M. (P-H) 1985-192. This is particularly so where, as here, the facts are assumed to support the petitioners who are merely responding with legal arguments on a motion to dismiss. Unfortunately, however, it has not been uncommon for the Tax Court to render overly restrictive, wooden, interpretations of its Section 7476 jurisdiction.

Indeed, the Tax Court has, on occasion, even acknowledged its predisposition to apply an overly narrow interpretation of its jurisdictional powers to render declaratory judgments.

In an unusual gesture of self-admonition, the Tax Court in *Dittler Brothers, Inc.*, 72 T.C. 896 (1979) stated:

Regrettably as Congress has recently chosen to bestow various new forms of jurisdiction upon us in the declaratory relief area, we have reacted with the most begrudging and narrow interpretations, engendering both statutory and judicial reversals of our positions, e.g. *Sheppard & Myers v. Commissioner* 67 TC 26 (1976), in effect reversed by amendments to Section 7428 and 7476. *Fed. Land Bank Assoc. v. Commissioner* 67 TC 29 (1976) rev'd., 273 F. 2d 179 (4th Cir. 1978).

We should take the hint and attempt, where we can do so with a fair construction of the Congressional language, to read these new provisions so as to effectuate rather than frustrate the Congressional purpose.

In the case at bar, the Special Trial Judge unfortunately did not take heed to the Tax Court's own warning, and the Second Circuit failed to correct the erroneous ruling on jurisdiction.

E. The rights of plan participants have been seriously violated as a result of the Commissioner's Determination and the Tax Court's failure to review it.

The Tax Court's dismissal of plan participants' plea for judicial review of their case was a serious violation of their rights. Moreover, this dismissal set in motion a series of exceptionally harmful and unjust effects, further injuring plan participants. The unique set of circumstances surrounding this case, which has compounded the error and injustice and caused severe injury, includes the following:

First, the IRS made the original 1976 determination on the integration of the pension plans without giving petitioners the opportunity to comment thereon. After petitioners' unsuccessful attempts to convince the Commissioner to set aside the original determination, they challenged his 1985 determination. Yet, the Special Trial Judge of the Tax Court ruled that there was no jurisdiction, despite the recognition by the IRS Commissioner that all prerequisites for jurisdiction were met.

Secondly, the Second Circuit Court of Appeals in reviewing the Special Trial Judge, ignored the language of its prior ruling relating to these same parties. In *Wenzel*, the Second Circuit Court of Appeals made certain recommendations so that ripeness and an opportunity for participants to challenge the Commissioner's determination could occur:

Accordingly we urge that in event of further proceedings the Commissioner and the parties, in the interest of avoiding further loss of public confidence and esteem, give top priority to a prompt determination of the issue of whether there was a partial termination of the Brewery Worker's Fund.

Wenzel, supra at 697.

Hence, the Second Circuit both anticipated and contemplated the prospect that participants would have the opportunity to pursue their legal challenge to the Commissioner's determination once IRS had answered the "partial termination question."⁸ Had the Second Circuit in the first appeal ruled definitively and not made any recommendations, plan parti-

⁸The Commissioner definitively ruled that a partial termination of the Brewery Workers Fund had occurred prior to its integration with the NYS Fund and issued a reviewable determination letter concerning the effect of partial termination on tax qualified status dated February 12, 1985. The IRS declared on record in the Tax Court that such determination lawfully required a review under Section 7476.

cipants might not have wasted valuable time and resources in returning to the IRS to obtain a ruling of partial termination before being able to challenge the ultimate determination as to tax qualified status.⁹

Thirdly, on the recent appeal to the Second Circuit, the Second Circuit panel issued a *per curiam* opinion. The Second Circuit offered no explanation as to why the Tax Court was able to abdicate its responsibility to grant participants a review of that determination as provided under law, and offered no explanation, for the edification of bench and bar alike, as to why the rights of participants to judicial review of their determination could lawfully be denied.

Finally, it must be noted that the record demonstrates that participants have so far been damaged in the amount of more than seven million dollars in irrecoverable payments from their retirement plan and that each year the total increases by more than seven hundred thousand dollars. Elemental precepts of due process, along with the Congressionally mandated cause of action, operate to guarantee the participants' right to have legal review over the distribution of such sizable assets.

The panel's opinion is in conflict with these heretofore unquestioned rights as well as the previous ruling of the Second Circuit Court of Appeals. The Second Circuit's ruling sets bad precedent, offering no guidance, rationale or justification for denying these participants their statutory right.

By depriving these pension plan participants of the right to judicial review of determination letters affecting their pension plans, the Tax Court has eroded a fundamental statutory right

⁹The Second Circuit Court of Appeals recognized in *Wenzel* that, "a plan's treatment of partial termination has consequences for its tax status and partial termination is itself a reportable event under ERISA." 853 F.2d 1071 and 1072.

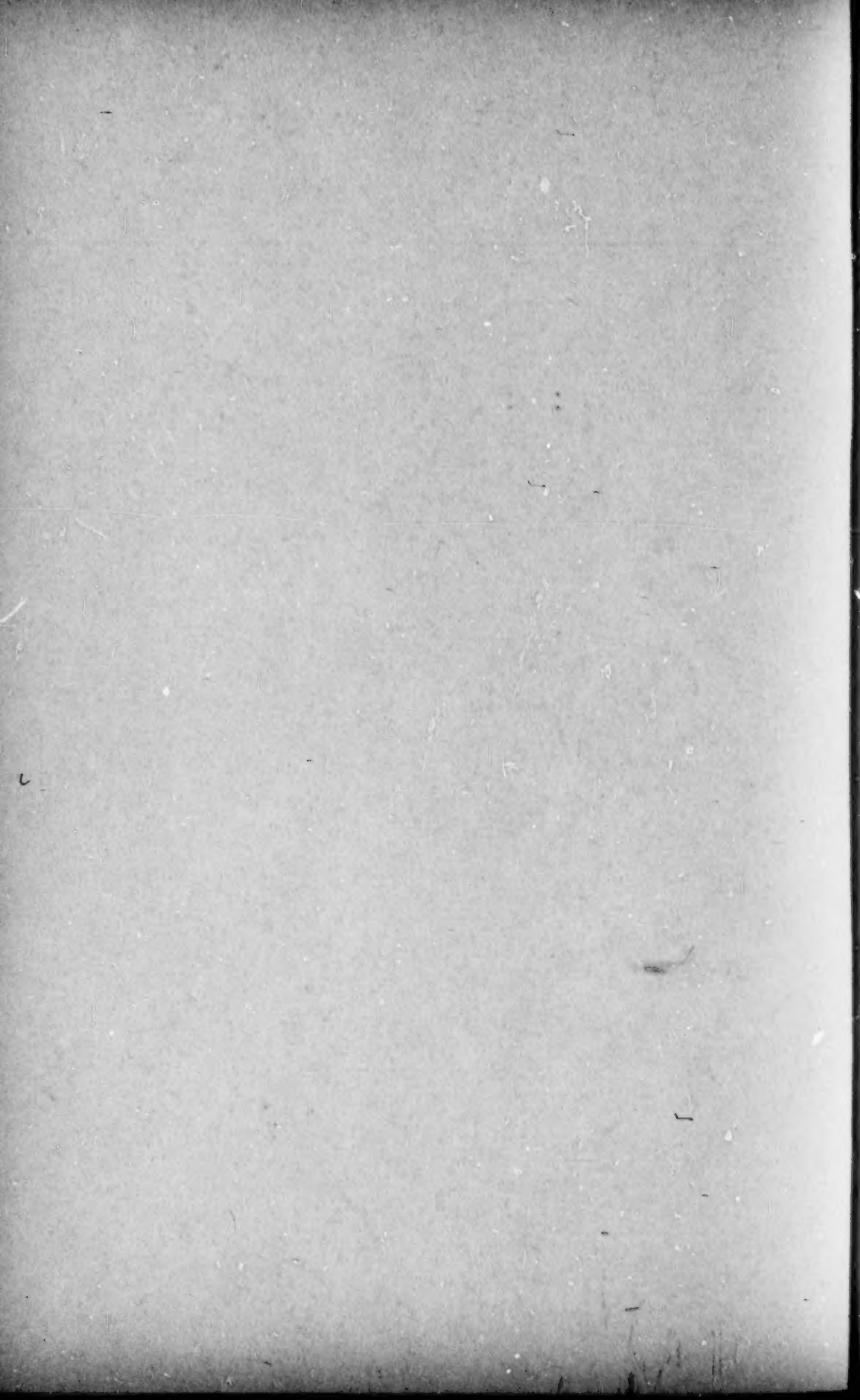
for all pension plan participants to be able to seek judicial review of IRS determinations relating to the qualified status of their plans.

CONCLUSION

For the foregoing reasons, to clarify the law important to millions of pension plan participants, and to uphold the clearly indicated design of Congress, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

90 T.C. No. 57

UNITED STATES TAX COURT

DENNIS LOFTUS, ET AL.,¹ Petitioners, v.
COMMISSIONER OF INTERNAL REVENUE, AND
JOHN HOH, KENNETH CAROLL, ANTHONY GRAU,
AND ANGELO FERRARO,
FORMER TRUSTEES OF THE BREWERY WORKERS
PENSION FUND, Respondents

Docket Nos. 12440-85R, 12441-85R, Filed May 9, 1988.
12442-85R, 12443-85R,
12444-85R.

In 1973, the Brewery Workers Pension Fund and the Teamsters Pension Fund agreed to merge. Subsequent to the agreement, but prior to the date of the merger, Reingold Breweries, one of the largest employer contributors to the Brewery Workers Fund, ceased operations. The Teamsters Fund refused to proceed with the merger. The New York State Supreme Court ordered the Teamsters to specifically perform the merger agreement. The Internal Revenue Service issued a ruling that the merger amendment would not affect the existing qualification of the Teamsters Fund. Subsequently, the New York Supreme Court declared the Teamsters Fund and Brewery Workers Fund fully integrated as of December 1, 1976.

¹The cases of the following petitioners are consolidated herewith: Dennis Loftus, docket No. 12440-85R; Brewery Workers Pension Fund by Rocco F. DePerno, Paul E. Bush, Jack Canzoneri, T. Edward Nolan, Curtis Gunderson and Richard Muller, docket No. 12441-85R; Lawrence Wheat, docket No. 12442-85R; William Pryzlucki, docket No. 12443-85R; and Earl LeClair, docket No. 12444-85R.

On September 30, 1983, T (Teamsters trustees) requested a determination as to the qualified status of the Brewery Workers Fund prior to the date of the merger. C (Commissioner) determined that the Brewery Workers Fund, as in effect prior to the merger with the Teamsters Fund, was a qualified plan. Ts and Ps (participants in the Teamsters Fund) bring this action for declaratory judgment. F (former Brewery Workers Fund Trustees), joined as additional parties in this action, filed a Motion to Dismiss for Lack of Jurisdiction.

Held, that Ts are not entitled to declaratory relief as they have not demonstrated that there is an actual controversy within the meaning of section 7476. *Held further*, that Ps do not have standing to seek declaratory relief as they are not interested parties with respect to the Brewery Workers Fund. *Held further*, that F's Motion to Dismiss for Lack of Jurisdiction is granted.

Robert Whoriskey and Lawrence V. Kelly, for the petitioners.

Sarah Hall and Daniel Wiles, for the respondent commissioner.

Susan Martin and Jacob Friedman, for the respondent former trustees.

OPINION

NIMS, *Judge*: These cases were heard by Special Trial Judge Peter J. Panuthos pursuant to the provisions of section 7456 of the Code.² The Court agrees with and adopts the Special Trial Judge's opinion, which is set forth below.

²These cases were assigned pursuant to section 7456 (redesignated as section 7443A by the Tax Reform Act of 1986, Pub. L. 99-514, section 1556, 100 Stat. 2755) and Rule 180. All section references are to the In-

OPINION OF THE SPECIAL TRIAL JUDGE

PANUTHOS, *Special Trial Judge*: Petitioners, in these consolidated cases, brought actions for declaratory judgment under section 7476.³ Petitioners in these cases are as follows:

<u>Docket No.</u>	<u>Identity</u>	<u>Relationship</u>
12441-85R	Brewery Workers Pension Fund by Rocco DePerno, Paul E. Bush, Jack Canzoneri, T. Edward Nolan, Curtis Gunderson and Richard Muller	Trustees and plan administrator of the New York State Teamsters Conference Pension and Retirement Fund acting as successor trustees and plan administrator of the Brewery Workers Fund. ⁴
12440-85R	Dennis Loftus)	Covered participants in the New York State Teamsters Conference Pension and Retirement Fund.
12442-85R	Lawrence Wheat)	
12443-85R	William Pryzlucki)	
12444-85R	Earl LeClair)	

Respondents in these cases are (1) the Commissioner of Internal Revenue (hereinafter the Commissioner) and (2) John

ternal Revenue Code, and all Rule references are to the Tax Court Rules of Practice and Procedure.

³On May 13, 1985, petitions in 10 related cases were filed. On October 9, 1985, we granted petitioners' Motions to Consolidate those cases into two groups of five cases each; one group consisting of docket numbers 12440-85R through 12444-85R, and the other group consisting of docket numbers 12445-85R through 12449-85R. We have filed on this same date our opinion respecting docket numbers 12445-85R through 12449-85R as *New York State Teamsters Conference Pension and Retirement Fund v. Commissioner*, 90 T.C. ____ (May 9, 1988).

⁴Pursuant to a document entitled Agreement and Plan of Integration, executed by the Teamsters Fund on July 30, 1973 and by the Brewery Workers Fund on August 7, 1973, the rights and duties of the resigning Brewery Workers Fund Trustees were assigned to the Teamsters Trustees upon approval of the merger agreement by the Internal Revenue Service.

Hoh, Kenneth Carroll, Anthony Grau, and Angelo Ferraro, all of whom are former trustees of the Brewery Workers Pension Fund (hereinafter referred to as former trustees or Brewery Workers Fund Trustees.)⁵ These cases are before the Court on the former trustees' Motion to Dismiss for Lack of Jurisdiction.

ISSUE

The Commissioner issued a determination letter making a favorable determination as to the qualified status of the Brewery Workers Fund as in effect prior to its merger with the Teamsters Fund. The Commissioner also determined that while a partial termination of the Brewery Workers Fund occurred before full integration of the two plans, qualification was not affected, however, because participants in the fund were fully vested in their accrued benefits to the extent funded.

Petitioners allege that, in issuing the determination letter, the Commissioner "abused his discretion and acted unreasonably and arbitrarily by not determining:"

(i) that the partial termination of the Brewery Fund between January 1, 1976 and September 30, 1976 resulted in its disqualification under the Code and regulations; and,

(ii) that the disqualified Brewery Fund could not merge for Federal tax purposes with the qualified Teamsters Fund and have the merged fund qualified under section 401 of the Code; and,

(iii) that for Federal tax purposes the consolidation of the Brewery Fund with the Teamsters Fund as of December 1, 1976, pursuant to Court order, re-

⁵By Order, dated March 7, 1986, we granted the Commissioner's Motion to join the former trustees as additional parties.

sulted in the termination and disqualification of the Brewery Fund.

The issue in these cases is whether we should exercise our jurisdiction to issue a declaratory judgment with regard to the qualification of the Brewery Workers Fund or whether we should dismiss these cases for lack of jurisdiction.

FACTUAL BACKGROUND

(A) The Merger

The facts of these consolidated cases are not in dispute. An Agreement and Plan of Integration (the merger agreement) was entered into in 1973 between the Brewery Workers Fund and the Teamsters Fund, which provided for a merger of the two funds. Subsequent to the merger agreement, Reingold Breweries, one of the largest employer-contributors to the Brewery Workers Fund, ceased operations. This development made the merger much less attractive to the Teamsters Fund since it dramatically reduced the Brewery Workers Fund's prospective contributions to the joint plan without a proportionate reduction in the joint plan's prospective liabilities to Brewery Workers Fund participants. Consequently, counsel for the Teamsters Fund notified counsel for the Brewery Workers Fund that, in view of the Reingold closing, the Teamsters Fund trustees had voted not to proceed with the merger.

(B) Initial Merger Litigation

After the Teamsters Fund notified the Brewery Workers Fund that it intended not to proceed with the merger, the Brewery Workers Fund brought suit in the New York Supreme Court, Queens County. On April 29, 1975, the Supreme Court granted the Brewery Workers Fund's Motion for Summary

Judgment. The court decreed that the merger agreement was valid, binding and enforceable upon the parties thereto and directed the Teamsters Fund and its trustees to specifically perform the merger agreement. *Brewery Workers Pension Fund v. New York State Teamsters Conference Pension and Retirement Fund*, 49 A.D.2d 755, 374 N.Y.S.2d 590 (1975).

(c) The 1976 Application for A Determination

Under the terms of the merger agreement, performance of the merger was conditioned upon Internal Revenue Service approval of the merger agreement. The New York Supreme Court, in ordering the Teamsters Fund to perform the agreement, specifically ordered the Teamsters Fund trustees to execute the documents necessary to request approval of the merger by the Internal Revenue Service pursuant to the provisions of the merger agreement. It appears that the Teamsters Fund trustees did not fully cooperate in obtaining a determination. Nevertheless, on March 8, 1976 counsel for the Brewery Workers Fund submitted to the District Director, Internal Revenue Service, Buffalo, New York, a request for a determination that the qualified and exempt status of the Teamsters Fund would not be affected by the merger and that the merger of the two funds met the requirements of the Employee Retirement Income Security Act (ERISA)⁶ in that the Brewery Workers Fund would not terminate as a result of the merger.

By letter, dated September 28, 1976, the Buffalo District Director issued a favorable determination. On November 19, 1976, the Teamsters Fund requested that the determination letter of September 28, 1976 be revoked. In this regard, the

⁶Employee Retirement Income Security Act of 1974, Pub. L. 93-406, 93 Stat. 70.

Teamsters Fund claimed that it never filed an application for a determination, nor did it join with any other party in filing an application. Further, the Teamsters Fund argued that neither the trustees nor the participants in the Teamsters Fund had notice of the request for the determination until after the Internal Revenue Service issued the determination.

After several conferences, the National Office of the Internal Revenue Service issued a technical advice memorandum, dated October 25, 1978, concluding that participants in the Teamsters Fund should have received notice of the ruling request that resulted in the determination letter of September 28, 1976. The memorandum further advised that the Teamsters Fund participants should now be given notice, but that the determination letter should not be withdrawn during the period within which these parties were to be afforded the opportunity to comment on the determination. Subsequently, the Teamsters Fund sent notice to its members, some of whom submitted comments with respect to the 1976 determination concerning the proposed merger. On June 9, 1979, the Internal Revenue Service ruled that its 1976 determination was proper.

(D) Subsequent Litigation Regarding the Merger

The merger of the Teamsters Fund and Brewery Workers Fund has been the subject of extensive litigation in both New York State Courts and Federal Courts. This course of litigation began when the Brewery Workers Fund initially brought suit⁷ complaining of the Teamsters Fund's refusal to perform the merger, and continues today in this Court and others.⁸

⁷See section B, *supra* "Initial Merger Litigation."

⁸Petitioners, in their Memorandum in Opposition to Former Brewery Trustees Motion to Dismiss, filed February 20, 1987, state that a suit brought by the Brewery Workers Fund is currently pending in the United

The following is a summary of such litigation in New York and Federal Courts.

(1) State Court Litigation

After the 1976 determination letter was issued, by instrument dated November 19, 1976, the Brewery Workers Fund trustees resigned effective December 1, 1976 and transferred the assets of the Brewery Workers Fund to the Teamsters Fund trustees. The Teamsters Fund trustees refused to accept the assets assigned by the Brewery Workers Fund trustees. In addition, the Teamsters Fund trustees refused to pay benefits to or accept contributions on behalf of Brewery Workers Fund participants.

The Brewery Workers Fund accordingly sought additional relief in the New York Supreme Court. On April 12, 1977, an Order and Supplemental Judgment was entered declaring that the Brewery Workers Fund was fully integrated with the Teamsters Fund as of December 1, 1976. The Order directed the Teamsters Fund to (1) accept all assets and liabilities of the Brewery Workers Fund; (2) pay benefits and accept contributions on behalf of the Brewery Workers Fund; and, (3) notify Brewery Workers Fund participants of their rights and

States District Court for the Eastern District of New York. Plaintiffs in that case requested that the Court temporarily and permanently enjoin the Teamsters Fund from litigating the validity of the merger and from refusing to accept contributions from certain employer-contributors. Also, plaintiffs have asked the Court to remove the trustees of the Teamsters Fund for violations of fiduciary obligations, and requested the Court to appoint a temporary receiver. In response, the Teamsters Fund has filed several counter-claims against former trustees of the Brewery Workers Fund as well as present and former employer-contributors to that fund. According to petitioners, the Court has summarily denied the temporary restraining order and has stayed proceedings in that case pending the outcome of these consolidated cases.

options under the merger agreement. *Brewery Workers Pension Fund v. New York State Teamsters Conference Pension and Retirement Fund*, 62 A.D.2d 1046, 404 N.Y.S.2d 158 (1978).

Even though the Order and Supplemental Judgment was not stayed pending the outcome of the appeals, the Teamsters Fund trustees refused to comply with the Order. On September 19, 1977, the Supreme Court, Queens County, accordingly found the Teamsters Fund trustees in contempt. They were ordered to purge their contempt within five days.

The Teamsters Fund purged the contempt in part, but failed to properly notify Brewery Workers Fund participants of their rights and options under the merger agreement. Accordingly, the Brewery Workers Fund moved to impose further sanctions for contempt. The Teamsters Fund then filed a Motion to Vacate the New York Supreme Court's April 29, 1975 Judgment that declared the merger agreement to be valid and binding. On October 19, 1978, the New York Supreme Court granted the Brewery Workers Fund's Motion for Contempt Sanctions and denied the Teamsters Fund's Motion to Vacate the April 29, 1975 Judgment.

Subsequently, in January 1980, the Teamsters Fund moved for leave to renew their Motion to Vacate the April 29, 1975 Judgment and also sought to vacate the April 12, 1977 Order and Supplemental Judgment. By Orders, dated July 21, 1980 and August 7, 1980, these motions were denied. The Appellate Division affirmed the orders without opinion. *Brewery Workers Pension Fund v. New York State Teamsters Conference Pension and Retirement Fund*, 80 A.D.2d 1005, 437 N.Y.S.2d 216 (1981), *affd.* 55 N.Y.2d 902, 449 N.Y.S.2d 24, 433 N.E.2d 1272 (1982). Again, on October 4, 1981, the Teamsters Fund moved for leave to renew its Motion to Vacate the 1975 Order and Judgment. The New York Supreme

Court denied the motion and the Appellate Division affirmed that Order without opinion on April 11, 1983.

In connection with litigation over the validity of the merger, the Brewery Workers Fund trustees moved for enforcement of a provision of the merger agreement requiring the Teamsters Fund to indemnify the Brewery Workers Fund trustees for costs and expenses incurred in implementing the merger agreement and protecting the interests of the Brewery Workers Fund participants. The Appellate Division declared that the Brewery Workers Fund trustees were entitled to indemnification. *Brewery Workers Pension Fund v. New York State Teamsters Conference Pension and Retirement Fund*, 76 A.D.2d 876, 428 N.Y.S.2d 726 (1980).

(2) Federal Court Litigation

In January 1977, active and retired members of the Teamsters Fund commenced an action in the United States District Court for the Western District of New York seeking a preliminary and permanent injunction against the merger of the Brewery Workers Fund and Teamsters Fund. They also sought a declaratory judgment that the merger was invalid under ERISA. The Court denied the Teamsters Fund's Motion for Preliminary Injunction and dismissed the complaint *Cicatello v. Brewery Workers Pension Fund*, 434 F.Supp. 950 (W.D.N.Y. 1977), *affd.* without published opinion 578 F.2d 1366 (2d Cir. 1978).

Also, in January 1977, the Teamsters Fund brought suit against the Pension Benefit Guarantee Corporation (PBGC) and the Brewery Workers Fund in the United States District Court for the District of Columbia. In that case, the Teamsters Fund sought a declaratory judgment that the merger agreement was subject to sections 208 and 1015(c) of ERISA and sought an injunction directing the PBGC to assert jurisdiction

over the merger agreement and determine whether the merger was in violation of the standards set forth in ERISA. All parties filed Motions for Summary Judgment. On appeal the Court of Appeals affirmed the district court's denial of the Teamsters Fund's Motion for Summary Judgment and the granting of the Motions by the Brewer Workers Fund and the PBGC for Summary Judgment. In doing so, the Court of Appeals held that ERISA was not retroactive and therefore not applicable to the dispute regarding the enforceability of the merger agreement. The Court of Appeals further held that the Teamsters Fund was barred by the doctrine of res judicata from relitigating the validity of the merger. *New York State Teamsters Conference Pension and Retirement Fund v. Pension Benefit Guarantee Corp.*, 591 F.2d 953 (D.C. Cir. 1979), cert. denied 444 U.S. 829 (1979).

In September 1981, the Teamsters Fund brought suit in the United States District Court for the Northern District of New York against former Brewery Workers Fund trustees, former officers of Brewery Workers Delivery Employees Local Union Number 46, and former employer-contributors to the Brewery Workers Fund, alleging that improper contributions had been made on behalf of Union officers. The Court granted the defendants' Motions for Summary Judgment, finding no evidence supporting the Teamsters Fund's allegations. *New York State Teamsters Conference Pension and Retirement Fund v. Hoh*, 554 F.Supp. 519 (N.D.N.Y. 1982).

(E) The 1978 Application

On September 11, 1978, a new request for a determination was submitted on behalf of the Teamsters Fund "acting * * * as successor in interest to the Brewery Workers Pension Fund." The District Director was requested to rule that before the effective date of the merger agreement, and no

later than September 30, 1976, a partial termination of the Brewery Workers Fund had occurred. Notices of the September 11, 1978 determination request were sent by the Teamsters Fund to current participants, former participants with vested benefits, and beneficiaries of deceased former participants receiving benefits in the former Brewery Workers Fund. On October 25, 1978, the District Director in Brooklyn returned the application and request of September 11, 1978, and directed the Teamsters Fund to furnish evidence that proper notice had been given to all interested parties in accordance with the technical advice memorandum issued by the National Office on that same date. The trustees of the Teamsters Fund responded that it was their position that the technical advice memorandum referred only to the September 28, 1976 determination, and not to the determination request made on September 11, 1978. By letter, dated December 26, 1978, the Brooklyn District Director's office again advised petitioners that it was the District Director's position that all interested parties had not been notified of the request for a determination.

(F) Prior Tax Court Litigation

Thereafter, petitions for declaratory judgment under section 7476 were filed in this Court, requesting us to declare that the December 26, 1978 letter was an invalid determination by the Commissioner. We dismissed those cases on the basis that (1) the refusal of the I.R.S. to issue a determination with respect to the qualification of a retirement plan was not reviewable by the Tax Court because the refusal was based upon the absence of evidence establishing that the party requesting the ruling had given notice to all interested parties; and, (2) the December 26, 1978 letter did not constitute a determination with respect to continuing qualification upon which jurisdiction can be based under section 7476(a), and therefore, the substantive issues raised by the parties with

respect to a partial termination of one of two merged plans did not arise in the context of a determination as to whether the plan was qualified.⁹

(G) The 1983 Application

Thereafter, the trustees of the Teamsters Fund, acting as successor trustees of the Brewery Workers Fund, filed another application for a determination, dated September 30, 1983, with the District Director, Buffalo, New York. The District Director sought technical advice from the National Office with respect to the application. On June 1, 1984, the Teamsters Fund representatives attended a conference with the staff of the National Office to discuss the application. After the conference, a technical advice memorandum was issued to the District Director by the National Office. On February 12, 1985, the District Director issued a determination letter with respect to the application filed on behalf of the Brewery Workers Fund as it existed prior to its merger with the Teamsters Fund. The determination letter, which was based on the technical advice memorandum, stated as follows:

Based on the information supplied, we have made a favorable determination regarding the qualification of the Brewery Workers Pension Plan in effect prior to the merger into the New York State Teamsters Conference Pension and Retirement Fund.

This letter also concerns your request for a determination as to whether a partial termination of the Brewery Workers Pension Plan occurred within the

⁹*New York State Teamsters Conference Pension and Retirement Fund v. Commissioner*, T.C. Memo. 1982-593, *New York State Teamsters Conference Pension and Retirement Fund v. Commissioner*, T.C. Memo. 1982-594, and *Wenzel v. Commissioner*, T.C. Memo. 1982-595, *affd.* on consolidated appeal *Wenzel v. Commissioner*, 707 F.2d 694 (2d Cir. 1983).

meaning of section 411(d)(3) of the Internal Revenue Code and the regulations thereunder between January 1, 1976 and September 30, 1976, prior to the effective date of the merger agreement of the Brewery Fund into the New York State Teamsters Conference Pension and Retirement Fund.

Based on the facts submitted, we have determined that a partial termination of the Brewery Workers Pension Fund occurred between January 1, 1976, and September 30, 1976, and before the December 1, 1976, date on which the court said the two plans were fully integrated. Even though a partial termination of the Brewery Workers plan occurred, it required no additional vesting and had no effect on the qualification of the plan due to the fact [that] participants were fully vested in their accrued benefits to the extent funded, at the time of the partial termination.

This letter relates only to the status of your plan under the Internal Revenue Code. It is not a determination regarding the effect of other Federal or local statutes.

Thereafter, petitions in the cases before us were filed.

OPINION

In order for us to exercise jurisdiction over a declaratory judgment action under section 7476, there must be an "actual controversy involving a determination by the Secretary with respect to the initial * * * or continuing qualification of a retirement plan * * * or a failure by the Secretary to make a determination with respect to such initial * * * or continuing qualification if the controversy arises from a plan amendment or plan termination * * *." Section 7476(a). The former

trustees allege, in part, that there is no actual controversy involved here.

The United States Courts created under Article III of the U.S. Constitution, as a matter of constitutional law, have jurisdiction only of those cases which involve an actual controversy. *Golden v. Zwickler*, 394 U.S. 103, 108 (1969); *Altvater v. Freeman*, 319 U.S. 359, 363-365 (1943); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-241 (1937). Though in general the Tax Court, which was created under Article I of the Constitution, may not be explicitly subject to the Article III requirement of an actual controversy (see *Anthony v. Commissioner*, 66 T.C. 367 (1976), and the cases cited therein), section 7476, by its terms, makes such requirement applicable to the Tax Court in a declaratory judgment action. *Thompson v. Commissioner*, 71 T.C. 32, 38-39 (1978); see generally H. Rept. 93-807 (1974), 1974-3 C.B. (Supp.) 236, 342; H. Rept. 93-1280 (Conf.) (1974), 1974-3 C.B. 415, 492. In deciding whether an actual controversy exists, we look to the standard applied to Article III Courts in declaratory judgment actions as set forth by the Supreme Court in *Maryland Casualty Co. v. Pacific Coal and Oil Co.*, 312 U.S. 270, 273 (1941). In that case, the Court stated as follows:

Basically the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Maryland Casualty Co. v. Pacific Coal and Oil Co., *supra* at 273; see also *Golden v. Zwickler*, *supra*; *Altvater v. Freeman*, *supra*; *Aetna Life Ins. Co. v. Hawroth*, *supra*; H. Rept. 93-1280, *supra* at 492.

In these cases, there are two groups of petitioners. First, there are the teamsters trustees, and second, there are the participants in the Teamsters Fund.

(I) The Teamsters Trustees

Petitioners in docket number 12441-85R petition this Court in their capacities as trustees for the Teamsters Fund, and as successor trustees and plan administrator for the Brewery Workers Fund. Trustees of both the Teamsters Fund and the Brewery Workers Fund agreed to the merger, and signed the merger agreement. The Internal Revenue Service, without imposing conditions or requiring any change in the terms of the merger agreement, determined that the merger of the two funds would not affect the existing qualified status of the Teamsters Fund. The Teamsters Fund trustees, acting as successor trustees of the Brewery Workers Fund, subsequently requested a ruling that the Brewery Workers Fund underwent a partial termination prior to the merger and that such partial termination disqualified the Brewery Workers Fund such that it could not merge with the Teamsters Fund.

Thus, we are faced with a situation where the Internal Revenue Service has determined that the plan is qualified. Trustees of the Teamsters Fund, acting as successor trustees of the Brewery Workers Fund now appeal this determination, claiming that it is adverse to them. The former trustees of the Brewery Workers Fund, respondents here, argue that this is a favorable determination and that petitioners cannot demonstrate adversity to it.

We believe that a trustee can, under certain circumstances, demonstrate adversity to a favorable determination where qualification of the plan depends upon adoption of plan amendments or conditions imposed by the Internal Revenue Service. Indeed, Congress recognized that prior to enactment of sec-

tion 7476, the absence of a declaratory judgment remedy almost always caused the employer to go along with the Service, even if the employer disagreed with the Service's determination. See S. Rept. 93-383 (1974), 1974-3 C.B. 1, 192; H. Rept. 93-807, *supra* at 341. Likewise, in declaratory judgment actions under section 7428, we have found the requisite actual controversy where an organization was granted exempt status, but on a basis different from that requested. See *Foundation of Human Understanding v. Commissioner*, 88 T.C. 1341 (1987); *Friends of the Society of Servants of God v. Commissioner*, 75 T.C. 209 (1980).¹⁰ In each of those cases, although the Service determined that the organization was exempt from tax, it did so on the basis of an exemption that was less advantageous than that requested by the organization. In each case, the taxpayer sought tax exemption as a church. The Service, in each case, determined that the taxpayers were exempt organizations, but were not churches. We found in those cases that, although exempt from taxation, the taxpayers, because they were not classified as churches, were subject to requirements they would not otherwise be required to meet if they had been classified as churches. *Foundation of Human Understanding v. Commissioner*, *supra* at 1355; *Friends of the Society of Servants of God v. Commissioner*, *supra*. This, we held, provided the requisite adversity for declaratory judgment.

In the present cases, the Commissioners unconditionally approved the merger agreement as drafted and as agreed to by the Teamsters Fund and Brewery Workers Fund. There is no threatened action on the part of the Service to revoke the determination of the merger plan as qualified. The Commissioner appears to have no interest in the dispute with regard to the merger agreement. He has determined that the merg-

¹⁰See also *Universal Bible Church v. Commissioner*, T.C. Memo. 1986-170.

ed funds qualify, and has neither conditioned the qualification on adoption of amendments, nor imposed any conditions to the qualification. Accordingly, there is no present threat that the Commissioner will issue a notice of deficiency.

It is clear that a real and immediate threat to a plan's qualification for special tax status is the basis for adversity intended by Congress in section 7476. The legislative history of section 7476 states that before there was a declaratory judgment remedy under the Code, the employer who had received an unfavorable ruling as to qualification would have had to put the plan into effect, make contributions and have those contributions disallowed, before he would be able to challenge the Commissioner's determination. See S. Rept. 93-383, *supra* at 191-192; H. Rept. 93-807, *supra* at 341. In such a case, there was an imminent threat that a notice of deficiency would be issued. Here there is no such threat.

In *New Community Senior Citizens Housing Corp. v. Commissioner*, 72 T.C. 372 (1979), we dismissed a petition for declaratory judgment under section 7428, a provision analogous to section 7476, on a similar basis. In that case, the taxpayer requested a ruling from the Commissioner as to whether certain proposed transactions would jeopardize its continuing qualification as a section 501(c)(3) organization. The Commissioner issued a ruling that one proposed transaction would jeopardize the taxpayer's tax exempt status. The taxpayer, therefore, filed a petition under section 7428, seeking our review of the Commissioner's ruling. In deciding that case, we noted that "an expressed Congressional purpose for the enactment of section 7428 was to provide prompt judicial review for organizations faced with the Commissioner's withdrawal of advance assurance of deductibility of contributions." *New Community Senior Citizens Housing Corp. v. Commissioner*, *supra* at 375. We reasoned that "the evil

associated with a revocation of tax exempt status — a loss of a deduction for contributions'' was simply not present in that case. Although we recognized that revocation would be consistent with the Commissioner's ruling, any such revocation was speculative. The Commissioner had ruled that the proposed transactions would jeopardize exemption, not that revocation of the exemption would necessarily follow.

Here, inasmuch as there is no present threat to the Brewery Workers Fund's qualified status, the express purpose of Congress in providing a declaratory judgment remedy under section 7476 has not been met. We find that there is no actual controversy concerning the Teamsters trustees. Indeed, the Commissioner approved the merger agreement as negotiated and agreed to by the parties. That the merger later became unattractive to the Teamsters Fund, requiring judicial enforcement of the merger contract, is a controversy not cognizable under section 7476. Accordingly, these petitioners, Teamsters Fund trustees, have not demonstrated the adversity necessary for declaratory judgment under section 7476.

(II) Teamsters Fund Participants

We next consider petitioners in docket numbers 12440-85R, and 12442-85R through 12444-85R. All of these petitioners are covered participants in the Teamsters Fund.

Section 7476(b)(1) provides that ''a pleading may be filed under this section only by a petitioner who is the employer, the plan administrator, [or] an employee who has qualified under regulations * * * as an interested party for purposes of pursuing administrative remedies within the Internal Revenue Service * * *.'' Petitioners argue that they are interested parties within the meaning of section 1.7476-1(b), Income Tax Regs. Section 1.7476-1(b)(5) provides that in the

case of an adverse determination with respect to whether a plan termination affects continuing qualification, "all present employees with accrued benefits under the plan, all former employees with vested benefits under the plan, and all beneficiaries of deceased former employees currently receiving benefits under the plan shall be interested parties." Petitioners rely on section 1.7476-1(c)(1) of the regulations for the proposition that the status of an individual as an interested party is determined generally when notice of an application for determination is given. Thus, petitioners argue that as they were "present employees" of the Teamsters Fund at the time the 1983 application for determination was made, they are interested parties.

Clearly, the 1983 request concerned a determination with respect to the qualified status of the Brewery Workers Fund prior to the merger. Section 1.7476-1(b)(5), Income Tax Regs., makes it clear that to be an interested party, an employee must have accrued benefits (present employee), vested benefits (former employee), or be receiving benefits (beneficiary of a deceased former employee) under the plan. While petitioners may meet one of these categories with respect to the Teamsters Fund, they do not so qualify as interested parties with respect to the Brewery Workers Fund.

The legislative history of section 7476 provides that "to bring an action an individual must have been an employee of the employer during the period for which he is requesting the qualification of the plan." S.Rept. 93-383, *supra* at 194-195. Petitioners here, who are participants in the Teamsters Fund, seek a declaratory judgment with respect to the Brewery Workers Fund. Clearly they are not now, nor have they ever been, employees of any employer contributing to the Brewery Workers Fund.

Nevertheless, petitioners appear to argue that by reason

of the merger, employees participating in the Teamsters Fund are interested parties with respect to the Brewery Workers Fund, despite the fact that such employees have never participated in the Brewery Workers Fund. Section 7476 makes it clear that an interested party with respect to a plan must have vested or accrued benefits, or be receiving benefits under that plan. Petitioners do not now have, nor have they ever had, any such interests under the Brewery Workers Fund.

Our jurisdiction is statutory and cannot be enlarged by the actions of the parties. See *Freedman v. Commissioner*, 71 T.C. 564 (1979). Under section 7476, only specifically defined categories of interested parties may petition this Court for declaratory relief. Petitioners, participants in the Teamsters Fund, are not interested parties with respect to a determination as to the qualified status of the Brewery Workers Fund. We find that petitioners are statutorily barred from petitioning for declaratory relief, and therefore, lack standing to maintain this action. See *American New Covenant Church v. Commissioner*, 74 T.C. 293 (1980).¹¹ Accordingly, these cases must be dismissed for lack of jurisdiction.

CONCLUSION

There is no doubt that a controversy exists here. But, we find that the controversy does not arise from a determination regarding the qualified status of a plan. Rather, the controversy arises from the merger agreement which, after ratifying, the Teamsters Fund trustees declined to perform because of changed circumstances which made the proposed merger less attractive. As previously noted, the Teamsters Fund was ordered by the New York Supreme Court to specifically perform the merger. Performance was conditioned on approval

¹¹See also *Jones v. Commissioner*, T.C. Memo. 1980-512.

of the merger by the Internal Revenue Service. This approval was received in September 1976 and the New York State Supreme Court declared the funds fully integrated. Petitioners here have asked that we order revocation of the 1976 ruling. We are clearly without jurisdiction to do so. In this regard, we note that our jurisdiction is limited to determining whether a plan is or is not qualified. S. Rept. 93-383, *supra* at 193; *Wenzel v. Commissioner*, 707 F.2d 694, 696 (2d Cir. 1983), *affg.* Memorandum Opinions of this Court.

The real controversy in these cases relates not to the Commissioner's determination, but to a merger contract gone sour. That is, the real controversy is between the Teamsters Fund and the Brewery Workers Fund regarding a merger agreement which includes as one of its terms a requirement that the merger agreement be approved by the Internal Revenue Service. Congress gave the Tax Court jurisdiction over controversies concerning the Commissioner's determination regarding qualified status of a plan. Clearly, the merger dispute is a question of state law (See *New York State Teamsters Conference Pension and Retirement Fund v. Pension Benefit Guaranty Corp.*, 591 F.2d 953 (D.C. Cir. 1999)) and not a matter within our jurisdiction under section 7476.

For the reasons stated herein, respondent former trustees' Motion to Dismiss for Lack of Jurisdiction will be granted.

*An appropriate order will
be entered.*

90 T.C. No. 58

UNITED STATES TAX COURT

NEW YORK STATE TEAMSTERS CONFERENCE
PENSION AND RETIREMENT
FUND, ET AL.,¹ Petitioners v.COMMISSIONER OF INTERNAL REVENUE, AND
JOHN HOH, KENNETH CARROLL, ANTHONY GRAU,
AND ANGELO FERRARO, FORMER TRUSTEES OF
THE BREWERY WORKERS PENSION FUND, RespondentsDocket Nos. 12440-85R, 12441-85R, Filed May 9, 1988.
12442-85R, 12443-85R,
12444-85R.

In 1973, the Brewery Workers Pension Fund and the Teamsters Pension Fund agreed to merge. Subsequent to the agreement, but prior to the date of the merger, Reingold Breweries, one of the largest employer contributors to the Brewery Workers Fund, ceased operations. The Teamsters Fund refused to proceed with the merger. The New York State Supreme Court ordered the Teamsters to specifically perform the merger agreement. On September 28, 1976, the Internal Revenue Service issued a determination that the merger amendment would not affect the existing qualification of the Teamsters Fund. Subsequently, the New York Supreme Court declared the Teamsters Fund and

¹The cases of the following petitioners are consolidated herewith: New York State Teamsters Conference Pension and Retirement Fund by Rocco DePerno, Paul F. Bush, Jack Canzoneri, T. Edward Nolan, Curtis Gunderson and Richard Muller, docket No. 12445-85R; Peter DeMarco, docket No. 12446-85R; Richard Carbano, docket No. 12447-85R; Richard Wisnoski, docket No. 12448-85R; and Paul Litwin, docket No. 12449-85R.

Brewery Workers Fund fully integrated as of December 1, 1976.

On September 30, 1983, T (Teamsters trustees) made a "combined request" (1) for a determination as to the qualified status of the Brewery Workers Fund prior to the date of the merger, and (2) for a revocation or modification of the September 28, 1976 determination. In response to the request, C (Commissioner) determined that the Brewery Workers Fund, as in effect prior to the merger with the Teamsters Fund, was a qualified plan. Ts and Ps (participants in the Teamsters Fund) bring this action for declaratory judgment. F (former Brewery Workers Fund trustees), joined as additional parties in this action, filed a Motion to Dismiss for Lack of Jurisdiction.

Held, that Ts and Ps are not interested parties with respect to a request for a determination as to the qualified status of the Brewery Workers Fund. *Held further*, that the 1983 request for a revocation or modification of the 1976 determination does not constitute a request for a determination which may form the basis for jurisdiction under section 7476. *Held further*, that F's Motion to Dismiss for Lack of Jurisdiction is granted.

Robert Whoriskey and Lawrence V. Kelly, for the petitioners.

Sarah Hall and Daniel Wiles, for the respondent commissioner.

Susan Martin and Jacob Friedman, for the respondent former trustees.

OPINION

NIMS, *Judge*: These cases were heard by Special Trial Judge Peter J. Panuthos pursuant to the provisions of section 7456 of the Code.² The Court agrees with and adopts the Special Trial Judge's opinion, which is set forth below.

OPINION OF THE SPECIAL TRIAL JUDGE

PANUTHOS, *Special Trial Judge*: Petitioners, in these consolidated cases, brought actions for declaratory judgment under section 7476.³ Petitioners in these cases are as follows:

<u>Docket No.</u>	<u>Identity</u>	<u>Relationship</u>
12441-85R	New York State Teamsters Conference Pension and Retirement Fund by Rocco DePerno, Paul E. Bush, Jack Canzoneri, T. Edward Nolan, Curtis Gunderson and Richard Muller	Trustees and Plan Administrator of the New York State Teamsters Conference Pension and Retirement Fund.
12446-85R	Peter DeMarco)	Covered participants in the New York State Teamsters Conference Pension and Retirement Fund.
12447-85R	Richard Carbano)	
12448-85R	Richard Wisnoski)	
12449-85R	Paul Litwin)	

²These cases were assigned pursuant to section 7456 (redesignated as section 7443A by the Tax Reform Act of 1986, Pub. L. 99-514, section 1556, 100 Stat. 2755) and Rule 180. All section references are to the Internal Revenue Code, and all Rule references are to the Tax Court Rules of Practice and Procedure.

³On May 13, 1985, petitions in 10 related cases were filed. On October 9, 1985, we granted petitioners' Motions to Consolidate the cases into two groups of five cases each; one group consisting of docket numbers 12440-85R through 12444-85R, and the other group consisting of docket numbers 12445-85R through 12449-85R. We have filed on this same date our opinion respecting docket numbers 12440-85R through 12444-85R as *Loftus v. Commissioner*, 90 T.C. ____ (May 9, 1988).

Respondents in these cases are (1) the Commissioner of Internal Revenue (hereinafter the Commissioner) and (2) John Hoh, Kenneth Carroll, Anthony Grau, and Angelo Ferraro, all of whom are former trustees of the Brewery Workers Pension Fund (hereinafter referred to as former trustees or Brewery Workers Fund Trustees.)⁴ These cases are before the Court on the former trustees' Motion to Dismiss for Lack of Jurisdiction.

ISSUE

The Commissioner issued a determination letter making a favorable determination as to the qualified status of the Brewery Workers Fund as in effect prior to its merger with the Teamsters Fund. The Commissioner also determined that while a partial termination of the Brewery Workers Fund occurred before full integration of the two plans, qualification was not affected, however, because participants in the fund were fully vested in their accrued benefits to the extent funded.

Petitioners allege that, in issuing the determination letter, the Commissioner "abused his discretion and acted unreasonably and arbitrarily by not determining:"

(i) that the partial termination of the Brewery Fund between January 1, 1976 and September 30, 1976 resulted in its disqualification under the Code and regulations; and,

(ii) that the disqualified Brewery Fund could not merge for Federal tax purposes with the qualified Teamsters Fund and have the merged fund qualified under section 401 of the Code; and,

⁴By Order, dated March 7, 1986, we granted the Commissioner's Motion to join the former trustees as additional parties to this action.

(iii) that for Federal tax purposes the consolidation of the Brewery Fund with the Teamsters Fund as of December 1, 1976, pursuant to Court order, resulted in the termination and disqualification of the Brewery Fund.

Petitioners further allege that respondent failed to make a determination with respect to the continuing qualification of the Brewery Workers Fund.

The issue in these cases is whether we should exercise our jurisdiction to issue a declaratory judgment or whether we should dismiss these cases for lack of jurisdiction.

FACTUAL BACKGROUND

(A) The Merger

The facts of these consolidated cases are not in dispute. An Agreement and Plan of Integration (the merger agreement) was entered into in 1973 between the Brewery Workers Fund and the Teamsters Fund, which provided for a merger of the two funds. Subsequent to the merger agreement, Reingold Breweries, one of the largest employer-contributors to the Brewery Workers Fund, ceased operations. This development made the merger much less attractive to the Teamsters Fund since it dramatically reduced the Brewery Workers Fund's prospective contributions to the joint plan without a proportionate reduction in the joint plan's prospective liabilities to Brewery Workers Fund participants. Consequently, counsel for the Teamsters Fund notified counsel for the Brewery Workers Fund that, in view of the Reingold closing, the Teamsters Fund trustees had voted not to proceed with the merger.

(B) Initial Merger Litigation

After the Teamsters Fund notified the Brewery Workers Fund that it intended not to proceed with the merger, the Brewery Workers Fund brought suit in the New York Supreme Court, Queens County. On April 29, 1975, the Supreme Court granted the Brewery Workers Fund's Motion for Summary Judgment. The court decreed that the merger agreement was valid, binding and enforceable upon the parties thereto and directed the Teamsters Fund and its trustees to specifically perform the merger agreement. *Brewery Workers Pension Fund v. New York State Teamsters Conference Pension and Retirement Fund*, 49 A.D.2d 755, 374 N.Y.S.2d 590 (1975).

(c) The 1976 Application for A Determination

Under the terms of the merger agreement, performance of the merger was conditioned upon Internal Revenue Service approval of the merger agreement. The New York Supreme Court, in ordering the Teamsters Fund to perform the agreement, specifically ordered the Teamsters Fund trustees to execute the documents necessary to request approval of the merger by the Internal Revenue Service pursuant to the provisions of the merger agreement. It appears that the Teamsters Fund trustees did not fully cooperate in obtaining a determination. Nevertheless, on March 8, 1976 counsel for the Brewery Workers Fund submitted to the District Director, Internal Revenue Service, Buffalo, New York, a request for a determination that the qualified and exempt status of the Teamsters Fund would not be affected by the merger and that the merger of the two funds met the requirements of the Employee Retirement Income Security Act (ERISA)⁵ in that the Brewery Workers Fund would not terminate as a result of the merger.

⁵Employee Retirement Income Security Act of 1974, Pub. L. 93-406, 93 Stat. 70.

By letter, dated September 28, 1976, the Buffalo District Director issued a favorable determination. On November 19, 1976, the Teamsters Fund requested that the determination letter of September 28, 1976 be revoked. In this regard, the Teamsters Fund claimed that it never filed an application for a determination, nor did it join with any other party in filing an application. Further, the Teamsters Fund argued that neither the trustees nor the participants in the Teamsters Fund had notice of the request for the determination until after the Internal Revenue Service issued the determination.

After several conferences, the National Office of the Internal Revenue Service issued a technical advice memorandum, dated October 25, 1978, concluding that participants in the Teamsters Fund should have received notice of the ruling request that resulted in the determination letter of September 28, 1976. The memorandum further advised that the Teamsters Fund participants should now be given notice, but that the determination letter should not be withdrawn during the period within which these parties were to be afforded the opportunity to comment on the determination. Subsequently, the Teamsters Fund sent notice to its members, some of whom submitted comments with respect to the 1976 determination concerning the proposed merger. On June 9, 1979, the Internal Revenue Service ruled that its 1976 determination was proper.

(D) Subsequent Litigation Regarding the Merger

The merger of the Teamsters Fund and Brewery Workers Fund has been the subject of extensive litigation in both New York State Courts and Federal Courts. This course of litigation began when the Brewery Workers Fund initially brought suit⁶ complaining of the Teamsters Fund's refusal to perform

⁶See section B, *supra* "Initial Merger Litigation."

the merger, and continues today in this Court and others.⁷ The following is a summary of such litigation in New York and Federal Courts.

(1) State Court Litigation

After the 1976 determination letter was issued, by instrument dated November 19, 1976, the Brewery Workers Fund trustees resigned effective December 1, 1976 and transferred the assets of the Brewery Workers Fund to the Teamsters Fund trustees. The Teamsters Fund trustees refused to accept the assets assigned by the Brewery Workers Fund trustees. In addition, the Teamsters Fund trustees refused to pay benefits to or accept contributions on behalf of Brewery Workers Fund participants.

The Brewery Workers Fund accordingly sought additional relief in the New York Supreme Court. On April 12, 1977, an Order and Supplemental Judgment was entered declaring that the Brewery Workers Fund was fully integrated with the Teamsters Fund as of December 1, 1976. The Order directed the Teamsters Fund to (1) accept all assets and liabilities of

⁷Petitioners, in their Memorandum in Opposition to Former Brewery Trustees Motion to Dismiss, filed February 20, 1987, state that a suit brought by the Brewery Workers Fund is currently pending in the United States District Court for the Eastern District of New York. Plaintiffs in that case requested that the Court temporarily and permanently enjoin the Teamsters Fund from litigating the validity of the merger and from refusing to accept contributions from certain employer-contributors. Also, plaintiffs have asked the Court to remove the trustees of the Teamsters Fund for violations of fiduciary obligations, and requested the Court to appoint a temporary receiver. In response, the Teamsters Fund has filed several counter-claims against former trustees of the Brewery Workers Fund as well as present and former employer-contributors to that fund. According to petitioners, the Court has summarily denied the temporary restraining order and has stayed proceedings in that case pending the outcome of these consolidated cases.

the Brewery Workers Fund; (2) pay benefits and accept contributions on behalf of the Brewery Workers Fund; and, (3) notify Brewery Workers Fund participants of their rights and options under the merger agreement. *Brewery Workers Pension Fund v. New York State Teamsters Conference Pension and Retirement Fund*, 62 A.D.2d 1046, 404 N.Y.S.2d 158 (1978).

Even though the Order and Supplemental Judgment was not stayed pending the outcome of the appeals, the Teamsters Fund trustees refused to comply with the Order. On September 19, 1977, the Supreme Court, Queens County, accordingly found the Teamsters Fund trustees in contempt. They were ordered to purge their contempt within five days.

The Teamsters Fund purged the contempt in part, but failed to properly notify Brewery Workers Fund participants of their rights and options under the merger agreement. Accordingly, the Brewery Workers Fund moved to impose further sanctions for contempt. The Teamsters Fund then filed a Motion to Vacate the New York Supreme Court's April 29, 1975 Judgment that declared the merger agreement to be valid and binding. On October 19, 1978, the New York Supreme Court granted the Brewery Workers Fund's Motion for Contempt Sanctions and denied the Teamsters Fund's Motion to Vacate the April 29, 1975 Judgment.

Subsequently, in January 1980, the Teamsters Fund moved for leave to renew their Motion to Vacate the April 29, 1975 Judgment and also sought to vacate the April 12, 1977 Order and Supplemental Judgment. By Orders, dated July 21, 1980 and August 7, 1980, these motions were denied. The Appellate Division affirmed the orders without opinion. *Brewery Workers Pension Fund v. New York State Teamsters Conference Pension and Retirement Fund*, 80 A.D.2d 1005, 437 N.Y.S.2d 216 (1981), *affd.* 55 N.Y.2d 902, 449 N.Y.S.2d 24,

433 N.E.2d 1272 (1982). Again, on October 4, 1981, the Teamsters Fund moved for leave to renew its Motion to Vacate the 1975 Order and Judgment. The New York Supreme Court denied the motion and the Appellate Division affirmed that Order without opinion on April 11, 1983.

In connection with litigation over the validity of the merger, the Brewery Workers Fund trustees moved for enforcement of a provision of the merger agreement requiring the Teamsters Fund to indemnify the Brewery Workers Fund trustees for costs and expenses incurred in implementing the merger agreement and protecting the interests of the Brewery Workers Fund participants. The Appellate Division declared that the Brewery Workers Fund trustees were entitled to indemnification. *Brewery Workers Pension Fund v. New York State Teamsters Conference Pension and Retirement Fund*, 76 A.D.2d 876, 428 N.Y.S.2d 726 (1980).

(2) Federal Court Litigation

In January 1977, active and retired members of the Teamsters Fund commenced an action in the United States District Court for the Western District of New York seeking a preliminary and permanent injunction against the merger of the Brewery Workers Fund and Teamsters Fund. They also sought a declaratory judgment that the merger was invalid under ERISA. The Court denied the Teamsters Fund's Motion for Preliminary Injunction and dismissed the complaint. *Cicatello v. Brewery Workers Pension Fund*, 434 F.Supp. 950 (W.D.N.Y. 1977), affd. without published opinion 578 F.2d 1366 (2d Cir. 1978).

Also, in January 1977, the Teamsters Fund brought suit against the Pension Benefit Guarantee Corporation (PBGC) and the Brewery Workers Fund in the United States District Court for the District of Columbia. In that case, the Teamsters

Fund sought a declaratory judgment that the merger agreement was subject to sections 208 and 1015(c) of ERISA and sought an injunction directing the PBGC to assert jurisdiction over the merger agreement and determine whether the merger was in violation of the standards set forth in ERISA. All parties filed Motions for Summary Judgment. On appeal the Court of Appeals affirmed the district court's denial of the Teamsters Fund's Motion for Summary Judgment and the granting of the Motions by the Brewer Workers Fund and the PBGC for Summary Judgment. In doing so, the Court of Appeals held that ERISA was not retroactive and therefore not applicable to the dispute regarding the enforceability of the merger agreement. The Court of Appeals further held that the Teamsters Fund was barred by the doctrine of res judicata from relitigating the validity of the merger. *New York State Teamsters Conference Pension and Retirement Fund v. Pension Benefit Guarantee Corp.*, 591 F.2d 953 (D.C. Cir. 1979), cert. denied 444 U.S. 829 (1979).

In September 1981, the Teamsters Fund brought suit in the United States District Court for the Northern District of New York against former Brewery Workers Fund trustees, former officers of Brewery Workers Delivery Employees Local Union Number 46, and former employer-contributors to the Brewery Workers Fund, alleging that improper contributions had been made on behalf of Union officers. The Court granted the defendants' Motions for Summary Judgment, finding no evidence supporting the Teamsters Fund's allegations. *New York State Teamsters Conference Pension and Retirement Fund v. Hoh*, 554 F.Supp. 519 (N.D.N.Y. 1982).

(E) The 1978 Application

On September 11, 1978, a new request for a determination was submitted on behalf of the Teamsters Fund "acting

* * * as successor in interest to the Brewery Workers Pension Fund." The District Director was requested to rule that before the effective date of the merger agreement, and no later than September 30, 1976, a partial termination of the Brewery Workers Fund had occurred. Notices of the September 11, 1978 determination request were sent by the Teamsters Fund to current participants, former participants with vested benefits, and beneficiaries of deceased former participants receiving benefits in the former Brewery Workers Fund. On October 25, 1978, the District Director in Brooklyn returned the application and request of September 11, 1978, and directed the Teamsters Fund to furnish evidence that proper notice had been given to all interested parties in accordance with the technical advice memorandum issued by the National Office on that same date. The trustees of the Teamsters Fund responded that it was their position that the technical advice memorandum referred only to the September 28, 1976 determination, and not to the determination request made on September 11, 1978. By letter, dated December 26, 1978, the Brooklyn District Director's office again advised petitioners that it was the District Director's position that all interested parties had not been notified of the request for a determination.

(F) Prior Tax Court Litigation

Thereafter, petitions for declaratory judgment under section 7476 were filed in this Court, requesting us to declare that the December 26, 1978 letter was an invalid determination by the Commissioner. We dismissed those cases on the basis that (1) the refusal of the I.R.S. to issue a determination with respect to the qualification of a retirement plan was not reviewable by the Tax Court because the refusal was based upon the absence of evidence establishing that the party requesting the ruling had given notice to all interested parties; and, (2) the December 26, 1978 letter did not constitute a

determination with respect to continuing qualification upon which jurisdiction can be based under section 7476(a), and therefore, the substantive issues raised by the parties with respect to a partial termination of one of two merged plans did not arise in the context of a determination as to whether the plan was qualified.⁸

(G) The 1983 Application

Thereafter, the trustees of the Teamsters Fund, also claiming to act as successor trustees of the Brewery Workers Fund, filed another request for a determination, dated September 30, 1983, with the District Director, Buffalo, New York. This request purported to be a "combined request" regarding (1) the qualified status of Brewery Workers Fund, and (2) the qualified status of the Teamsters Fund.⁹

As concerns the Brewery Workers Fund, the September 30, 1983 request stated as follows:

With respect to the Brewery Workers Fund, we request that a determination be made that in or about January 1976 (but no later than September 30, 1976), a partial termination and a complete discontinuance of contributions under the Brewery Fund had occurred, within the meaning of section 411(d)(3) and Reg. sections 1.411(d)-2(b) and 2(d), respectively, of the "Code"). [Footnote omitted.] We further request a determination that the Brewery Fund was not a

⁸*New York State Teamsters Conference Pension and Retirement Fund v. Commissioner*, T.C. Memo. 1982-593, *New York State Teamsters Conference Pension and Retirement Fund v. Commissioner*, T.C. Memo. 1982-594, and *Wenzel v. Commissioner*, T.C. Memo. 1982-595, *affd.* on consolidated appeal *Wenzel v. Commissioner*, 707 F.2d 694 (2d Cir. 1983).

⁹*Loftus v. Commissioner*, 90 T.C. (May 9, 1988), concerned the request for a determination only as it related to the Brewery Workers Fund.

qualified plan under Code section 401 in that (i) the plan did not provide the requisite plan language concerning the immediate non-forfeitability of accrued benefits upon the occurrence of a termination or partial termination, as required by section 411(d)(3) and Reg. section 1.411(d)-2(a)(1), nor did the plan, prior to the occurrence of the partial termination or complete discontinuance of contributions, provide for the allocation of the previously unallocated funds, pursuant to Reg. section 1.411(d)-2(a)(2); and (ii) as a consequence of the partial termination and/or complete discontinuance of contributions, as defined by Code section 411(d)(3), the plan could no longer systematically provide for payment over a period of years of the definitely determinable benefits fixed by the plan, as required by Reg. section 1.401-1(b)(1)(i).

As concerns the Teamsters Fund, the September 30, 1983 request stated as follows:

With respect to the Teamsters Fund, we request a revocation or modification of the September 28, 1976, determination that held that the amendment to merge the Brewery Fund into the Teamsters Fund did not affect the existing qualification status of the Teamsters Fund on the grounds that (i) the determination did not consider the status of the Brewery Fund, which plan was disqualified, insolvent and partially terminated prior to the submission of the application, and (ii) the proposed amendment which provided for the transfer of the entire Brewery Fund plan without regard to that termination is not a qualified amendment, because a disqualified and terminated plan may not be resurrected by its merger with a qualified plan (at least to the extent of the terminated portion), and by not taking the disqualification and termination into account, the

proposed amendment violated the nondiversion requirement of Code section 401(a)(2) with respect to the pre-merger Teamsters Fund participants and Reg. section 1.401-1(b)(1)(i) and Code section 411(d)(3) (including the regulations there under with respect to the merged funds.

The Teamsters Fund trustees further requested that the Commissioner limit retroactive effect on the revocation to the disqualification of the merger amendment rather than to the entire Teamsters Fund. The reason stated for this was that "the material omissions in the application upon which the determination was based concerned the Brewery Fund and were made by a representative of that fund who unilaterally and deceptively submitted the application."

The District Director sought technical advice from the National Office with respect to the application. On June 1, 1984, the Teamsters Fund representatives attended a conference with the staff of the National Office to discuss the application. After the conference, a technical advice memorandum was issued to the District Director by the National Office. On February 12, 1985, the District Director issued a determination letter. The determination letter, which was based on the technical advice memorandum, stated as follows:

Based on the information supplied, we have made a favorable determination regarding the qualification of the Brewery Workers Pension Plan in effect prior to the merger into the New York State Teamsters Conference Pension and Retirement Fund.

This letter also concerns your request for a determination as to whether a partial termination of the Brewery Workers Pension Plan occurred within the meaning of section 411(d)(3) of the Internal Revenue Code and the regulations thereunder between Janu-

ary 1, 1976 and September 30, 1976, prior to the effective date of the merger agreement of the Brewery Fund into the New York State Teamsters Conference Pension and Retirement Fund.

Based on the facts submitted, we have determined that a partial termination of the Brewery Workers Pension Fund occurred between January 1, 1976, and September 30, 1976, and before the December 1, 1976, date on which the court said the two plans were fully integrated. Even though a partial termination of the Brewery Workers plan occurred, it required no additional vesting and had no effect on the qualification of the plan due to the fact [that] participants were fully vested in their accrued benefits to the extent funded, at the time of the partial termination.

This letter relates only to the status of your plan under the Internal Revenue Code. It is not a determination regarding the effect of other Federal or local statutes.

Thereafter, petitions in the cases before us were filed.

OPINION

Petitioners here petition for declaratory judgment on the basis that (1) the Commissioner's determination with respect to the pre-merged Brewery Workers Fund was erroneous, and (2) the Commissioner failed to make a determination with respect to the merged Teamsters Fund. We will consider each of the arguments set forth by petitioners, separately.

Determination Regarding the Pre-merged Brewery Workers Fund

Section 7476(b)(1) provides that “a pleading may be filed under this section only by a petitioner who is the employer, the plan administrator, [or] an employee who has qualified under regulations * * * as an interested party for purposes of pursuing administrative remedies within the Internal Revenue Service * * *.”

A) Teamsters Trustees

Petitioners in docket number 12445-85R petition for declaratory relief as trustees and plan administrator of the Teamsters Fund. Petitioners appear to argue that, as plan administrator of the Teamsters Fund, they are proper parties under section 7476(b)(1) to file a petition. However, we understand “the plan administrator” referred to in section 7476(b)(1) to mean the administrator of the plan for which the determination is requested. Clearly, the determination here was requested for the Brewery Workers Fund prior to the merger. Accordingly, petitioners in their capacities as trustees and plan administrator of the Teamsters Fund are not proper parties to request declaratory relief with respect to a determination as to the qualified status of the Brewery Workers Fund. Only the specifically defined categories of interested parties may petition for declaratory relief under section 7476(b)(1). Accordingly, we find that petitioners are statutorily barred from petitioning for declaratory relief and, therefore, lack standing to maintain this action. See *American New Covenant Church v. Commissioner*, 74 T.C. 293 (1980).¹⁰

¹⁰See also *Jones v. Commissioner*, T.C. Memo. 1980-51. We note that the trustees and plan administrator who act herein on behalf of the New York State Teamsters Conference Pension and Retirement Fund, i.e., Rocco DePerno, Paul E. Bush, Jack Canzoneri, T. Edward Nolan, Curtis

(B) Participants in the Teamsters Fund

Petitioners, in docket numbers 12446-85R through 12449-85R, petition as covered participants in the Teamsters Fund. They argue that they are interested parties within the meaning of section 1.7476-1(b), Income Tax Regs. Section 1.7476-1(b)(5) provides that "in the case of an adverse determination with respect to whether a plan termination affects continuing qualification, all present employees with accrued benefits under the plan, all former employees with vested benefits under the plan, and all beneficiaries of deceased former employees currently receiving benefits under the plan shall be interested parties." Petitioners rely on section 1.7476-1(c)(1) for the proposition that the status of an individual as an interested party is determined generally when notice of an application for determination is given. Thus, petitioners argue that as they were "present employees" of the Teamsters Fund at the time the 1983 application for determination was made, they are interested parties.

Clearly, the 1983 request concerned a determination with respect to the qualified status of the Brewery Workers Fund prior to the merger. Section 1.7476-1(b)(5), Income Tax Regs., makes it clear that to be an interested party, an employee must have accrued benefits (present employee), vested benefits (former employee), or be receiving benefits (beneficiary of a deceased former employee) under the plan.

Gunderson, and Richard Muller, are the same individuals who purport to act (inter alia) as the successor trustees and plan administrator on behalf of the Brewery Workers Fund in *Loftus v. Commisisoner*, involving docket numbers 12440-85R through 1244-85R. See note 3, *supra*. In *Loftus v. Commissioner*, 90 T.C. ____ (May 9, 1988), we also had before us a petition for declaratory judgment that the Commissioner's determination with respect to the pre-merged Brewery Workers Fund was erroneous. No question was raised in that case concerning the trustees' status as a party petitioner under section 7476(b)(1).

While petitioners may meet one of these categories with respect to the Teamsters Fund, they do not so qualify as interested parties with respect to the Brewery Workers Fund.

The legislative history of section 7476 provides that "to bring an action an individual must have been an employee of the employer during the period for which he is requesting the qualification of the plan." S. Rept. 93-383 (1974), 1974-3 C.B. 1, 194-195. Petitioners here seek a declaratory judgment with respect to the qualified status of the Brewery Workers Fund. Clearly they are not now, nor have they ever been, employees of any employer contributing to the Brewery Workers Fund.

Nevertheless, petitioners appear to argue that by reason of the merger, employees participating in the Teamsters Fund are interested parties with respect to the Brewery Workers Fund, despite the fact that such employees have never participated in the Brewery Workers Fund. It is clear that under section 7476, an interested party with respect to a plan must have vested or accrued benefits, or be receiving benefits under that plan. Petitioners do not now have, nor have they ever had, such interests under the Brewery Workers Fund.

Our jurisdiction is statutory and cannot be enlarged by the actions of the parties. See *Freedman v. Commissioner*, 71 T.C. 564 (1979). Under section 7476, only specifically defined categories of interested parties may petition this Court for declaratory relief. Petitioners, participants in the Teamsters Fund, are not interested parties with respect to a determination as to the qualified status of the Brewery Workers Fund. Accordingly, petitioners are statutorily barred from petitioning for declaratory relief, and therefore, lack standing to maintain this action. See *American New Covenant Church v. Commissioner*, *supra*.¹¹

¹¹See also *Jones v. Commissioner*, *supra*.

Failure to Make a Determination with Respect to the Teamsters Fund

Section 7476(a) provides that a party may request declaratory relief where the Commissioner fails to make a determination with respect to the initial or continuing qualification of a retirement plan if the controversy arises from a plan amendment or termination. Petitioners, with respect to the portion of the request for a determination as relates to the Teamsters Fund, argue that the Commissioner failed to make a determination.

Regarding the Teamsters Fund, petitioners in their request for a determination, requested "a revocation or modification of the September 28, 1976 determination that held that the amendment to merge the Brewery Fund into the Teamsters Fund did not affect the existing qualified status of the Teamsters Fund." The February 12, 1985 determination, on the other hand, held that the Brewery Workers Fund was qualified prior to its merger and that the partial termination of that Fund did not negatively affect its qualified status. We find that a request for modification or revocation of a determination resulting from a wholly different ruling request than that upon which jurisdiction is based is not such a request for a determination as would form the basis for jurisdiction under section 7476. See *New York State Teamsters Conference Pension and Retirement Fund v. Commissioner*, T.C. Memo. 1982-594, affd. sub nom. *Wenzel V. Commissioner*, 707 F.2d 694 (2d Cir. 1983).

Section 7476 grants jurisdiction only in narrowly defined circumstances. See *Thompson v. Commissioner*, 71 T.C. 32 (1978); *Sheppard & Myers, Inc. v. Commissioner*, 67 TC. 26 (1976). It requires that there be a determination or failure to make a determination *with respect to initial or continuing qualification* of a retirement plan. Petitioners' attempt to challenge the 1976 determination through the 1983 request for a deter-

mination does not constitute a request for a determination which may form the basis for jurisdiction under section 7476. See *New York State Teamsters Conference Pension and Retirement Fund v. Commissioner, supra*.

Although petitioners have characterized their request as a request for a determination as to the qualified status of the Teamsters Fund, it is clear that the gravamen of their request is that the Brewery Workers Fund as it existed prior to the merger be declared as not qualified for special tax treatment. This is clearly demonstrated by petitioners' request that the revocation or modification of the 1976 determination be limited to the merger amendment, not the entire Teamsters Fund. We view this request as a "backdoor" request for a determination that the Brewery Workers Fund, as it existed prior to the merger, was not qualified. We have already decided that petitioners have no standing to request declaratory relief as to a determination concerning the qualified status of the Brewery Workers Fund.¹² For the reasons stated herein, respondent former trustees' Motion to Dismiss for Lack of Jurisdiction will be granted.

*An appropriate order will
be entered.*

¹²See note 10, *supra*, and compare *Loftus v. Commissioner*, 90 T.C. ____ (May 9, 1988).

(TJM)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Twenty-fifth day of January, one thousand nine hundred and eighty-nine.

Present HONORABLE THOMAS J. MESKILL,
HONORABLE GEORGE C. PRATT,
HONORABLE FRANK X. ALTIMARI,
Circuit Judges.

DENNIS LOFTUS, LAWRENCE WHEAT,)	
WILLIAM PRYZLUCKI, EARL LeCLAIR, PETER)	
DeMARCO, RICHARD CARBANO, RICHARD)	
WISNOSKI, PAUL LITWIN, BREWERY WORKERS)	
PENSION FUND BY ROCCO F. DePERNO, PAUL)	
E. BUSH, JACK CANZONERI, T. EDWARD)	
NOLAN, CURTIS GUNDERSON and RICHARD)	
MULLER, Successor Trustees and Plan Ad-)	
ministrator of the Brewery Workers Pension Fund)	
and NEW YORK STATE TEAMSTERS CON-)	
FERENCE PENSION AND RETIREMENT FUND)	
BY ROCCO F. DePERNO, PAUL E. BUSH, JACK)	
CANZONERI, T. EDWARD NOLAN, CURTIS)	
GUNDERSON and RICHARD MULLER, Trustees)	
and Plan Administrator of the New York State)	
Teamsters Conference Pension and Retirement Fund,)	
<i>Petitioners-Appellants,</i>)	
	)	Docket Nos.
v.	)	88-4107
	)	88-4109
COMMISSIONER OF INTERNAL REVENUE, and)	
JOHN HOH, KENNETH CARROLL, ANTHONY)	
GRAU and ANGELO FERRARO, Former Trustees)	
of the Brewery Workers Pension Fund,)	
<i>Respondents-Appellees.</i>)	

This is an appeal from two orders of the United States Tax Court, Nims, J., dismissing the appellants' petitions for declaratory judgment pursuant to 26 U.S.C. § 7476. Adopting the opinions of Special Trial Judge Panuthos, the tax court granted the motions of respondents-appellees, former trustees of the Brewery Workers Pension Fund, to dismiss for lack of jurisdiction.

This cause came on to be heard on the transcript of record from said tax court and was argued by counsel.

✓ The orders of the tax court are AFFIRMED substantially for the reasons stated by Special Trial Judge Panuthos, as adopted by the tax court in *Loftus v. Commissioner*, 90 T.C. 845 (1988), and *New York State Teamsters Conference Pension and Retirement Fund v. Commissioner*, 90 T.C. 862 (1988).

/s/ Thomas J. Meskill, U.S.C.J.
Thomas J. Meskill, U.S.C.J.

/s/ George C. Pratt, U.S.C.J.
George C. Pratt, U.S.C.J.

/s/ Frank X. Altimari, U.S.C.J.
Frank X. Altimari, U.S.C.J.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 20th day of March, one thousand nine hundred and Eighty-nine

DENNIS LOFTUS, N.Y.S. TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND BY ROCCO F. DE PERNO, PAUL E. BUSH, JACK CANZONERI, T. EDWARD NOLAN, CURTIS GUNDERSON, and RICHARD MULLER, Trustees and Plan Administrator of the N.Y.S. Teamsters Conference Pension and Retirement Fund,

Petitioners-Appellants,

v.

DOCKET
NUMBER
88-4107

COMMISSIONER OF INTERNAL REVENUE, and JOHN HOH, KENNETH CARROLL, ANTHONY GRAU and ANGELO FERRARO, Former Trustees of the Brewery Workers Pension Fund,

Respondents-Appellees.

A petition for rehearing containing a suggestion that the action be heard in banc having been filed herein by petitioner-appellant, Dennis Loftus, Et. Al.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

BY: /s/ Fred M. Cassidy,
Fred M. Cassidy,
Chief Deputy Clerk

Supreme Court of the United States

No. A-910

Dennis Loftus, et al.

Petitioner

v.

Commissioner of Internal Revenue, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including July 17, 1989.

/s/ Thurgood Marshall
Associate Justice of the Supreme
Court of the United States

Dated this 19th
day of May, 1989.

Supreme Court of the United States

No. A-910

Dennis Loftus, et al.

Petitioner

v.

Commissioner of Internal Revenue, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including August 17, 1989.

/s/ Thurgood Marshall
Associate Justice of the Supreme
Court of the United States

Dated this 11th
day of July, 1989.

UNITED STATES TAX COURT

DENNIS LOFTUS, ET AL.,)	
	)	Docket Nos.12440-85"R"
Petitioners,	)	12441-85"R"
	)	12442-85"R"
v.	)	12443-85"R"
	)	12444-85"R"
COMMISSIONER OF INTERNAL REVENUE,)	
ET AL.,)	
Respondents.)	

NEW YORK STATE TEAMSTERS CON-)	
FERENCE PENSION AND RETIREMENT)	
FUND, ET AL.,)	
	)	Docket Nos.
Petitioners,	)	12445-85"R"
	)	12446-85"R"
v.	)	12447-85"R"
	)	12448-85"R"
COMMISSIONER OF INTERNAL REVNEUE,	)	12449-85"R"
ET AL.,)	
)	
Respondents.)	

RESPONDENT-COMMISSIONER'S MEMORANDUM IN
RESPONSE TO RESPONDENT-BREWERY WORKERS
FUND'S MOTION TO DISMISS AND PETITIONER'S
MOTION IN OPPOSITION

RESPONDENT RESPECTFULLY submits, pursuant to mutual agreement of the parties herein, a response to the respondent-Brewery Workers Fund's Motion to Dismiss filed September 17, 1986, and the petitioners' Memorandum in Opposition served on February 19, 1987.¹

¹Hereinafter respondent-New York Brewery Workers Fund will be referred to as the Brewery Fund, the New York State Teamsters Conference Pension and Retirement Fund as the Teamsters Fund, and respondent-Commissioner as respondent. The Funds as merged will be referred to

Due to the numerous jurisdictional arguments made by plaintiffs and the Brewery Fund, respondent herein discusses each of the jurisdiction requirements of Internal Revenue Code § 7476 (hereinafter "IRC"). Rather than repeat a lengthy chronology of the facts of this and prior cases, respondent refers the Court to respondent's National Office Technical Advice Memorandum attached as Exhibit A to each petition.

By letter dated September 30, 1983, an application for determination for collectively-bargained plans was submitted to the Buffalo IRS Key District Office on behalf of "(i) the Brewery Workers Pension Fund (. . .), as in effect prior to the merger of that plan into the New York State Teamsters Conference Pension and Retirement Fund on December 1, 1976, and (ii) the New York State Teamsters Conference Pension and Retirement Fund (. . .), as restated January 1, 1976." (Attached as Exhibit M to Memorandum of Former Brewery Fund Trustees in Support of Motion to Dismiss.) The letter states that the application was being filed by the trustees of the Teamsters Fund both in their own capacity and as successor trustees of the Brewery Fund.

The applicant requested the following determinations by the IRS:

Brewery Fund

1. The Brewery Fund experienced a partial termination and a complete discontinuance of contributions on or about January 1, 1976 (but no later than September 30, 1976).
2. The Brewery Fund did not qualify under § 401(a) because:

as "the Funds" or "the merged Funds". Except as specified, the petitions in the 10 cases, consolidated in two groups of five cases each, will be discussed as a group.

- a. the plan did not contain the language of § 411(d)(3) regarding the nonforfeitability of benefits and the allocation of previously unallocated funds, and
- b. due to the partial termination and/or complete discontinuance of contributions, the plan could no longer systematically provide for the payment over a period of years of the definitely determinable benefits fixed by the plan.

Teamsters Fund

1. Revocation or modification of IRS determination letter dated September 28, 1976, that held that the 1976 merger did not affect the qualified status of the Teamsters Fund, because
 - a. determination failed to consider the disqualified, insolvent and partially terminated status of the Brewery Fund;
 - b. the proposed amendment which provided for the transfer of the Brewery Fund could not be a qualified amendment because a disqualified and terminated plan cannot be resurrected by a merger into a qualified plan; and
 - c. by not taking into account the disqualification and termination of the Brewery Fund the amendment violated the nondiversification requirements of § 411(d)(3), with respect to both the pre-merger Teamsters Fund participants and the merged Funds.
2. That the Commissioner exercise his discretion under § 7805(b) to disqualify the merger amendment but not the Teamsters Fund itself on the ground that the 1976 application had material omissions and was submitted unilaterally and deceptively by representatives of the Brewery Fund.

The application further sets out the history of the dealings, in and out of various courts, of the Teamsters Fund, the Brewery Fund, and the IRS.²

As part of the Commissioner's consideration of the application, the IRS National Office issued a technical advice memorandum, which was attached to the final favorable determination letter issued February 12, 1985. That memorandum reached the following conclusions:

1. An application for a determination letter, raising the issue of whether a partial termination has occurred, could have been submitted by the trustees of the Brewery Fund and may now be requested by their successors. While a prompt application is contemplated by the procedures, nothing precludes such an application being made long after the relevant events have occurred.

2. The absence in the Brewery Fund of language concerning the requirements of § 411(d)(3) did not affect its qualification. Under Treas. Reg. § 1.401-6(e), before the effect date of ERISA,³ the Brewery Fund did not have to contain the similar pre-ERISA rule of § 401(a)(7). After the enactment of ERISA the Brewery Fund was required to contain the express language no later than December 31, 1977, the expiration of the last blanket extension of time to conform to the provisions added by ERISA. By that date the Brewery Fund had merged with the Teamsters Fund and the trustees had fulfilled the obligations to timely amend the merged Funds by filing an application for a determination letter which contained qualifying amendments.

²This past history is largely irrelevant to the current issue before the Court; that is, whether this Court has jurisdiction over these petitioners and their claims for relief.

³Employee Retirement Income Security Act of 1974, Title II of which amended 26 U.S.C., is referred to herein as "ERISA".

3. A partial termination of the Brewery Fund occurred in the 1976 plan year and before December 1, 1976, the date on which the court said the two funds were fully integrated. The merger had no effect on the partial termination.

4. The partial termination of the Brewery Fund had no effect on its qualification because § 411(d)(3) requires additional vesting upon a partial termination only to the extent funded; that is, to the extent that there are assets to cover any additional vesting. As the record showed that there were no assets to cover any vesting under § 411(d)(3), the Brewery Fund's failure to provide additional vesting upon the partial termination did not violate § 411(d)(3) and did not disqualify the plan.

5. The Brewery Fund was subject at that time to the funding requirements of § 412 so the "complete discontinuance of contributions" test was inapplicable. Even under that standard, there was no complete discontinuance. This issue did not affect the qualification of the plan.

6. Section 401(a)(2) prohibits the diversion of trust assets to purposes other than for the exclusive benefit of participants. No diversion occurs merely because pension payments are made under the terms of the plan to plan participants who entered the plan after some or all of the plan funds were contributed. The payments to Brewery Fund participants of benefits due under the merged Fund with assets contributed to the Teamsters Fund prior to the merger does not affect the qualification of the Brewery Fund or the Teamsters Fund.

7. The Brewery Fund provided a formula for the provision of definitely determinable benefits, as required by Treas. Reg. § 1.401-1(b)(1). While a qualified plan must be a funded plan, the failure to fund at a particular level does not disqualify a plan. The enforcement mechanism for insufficient funding is the imposition of excise taxes under § 4971, not disqualification of the plan under § 401(a).

8. The Brewery Fund was a qualified plan at the time of the merger and the merger of the Brewery Fund into the Teamsters Fund had no adverse effect on the qualification of the Teamsters Fund; accordingly there is no need to address the Teamsters Fund request for relief under § 7805(b).

The Commissioner's determination letter was issued on February 12, 1985. The petitions in these cases were filed May 13, 1985, having been timely mailed on May 10, 1985.

JURISDICTIONAL REQUIREMENTS: § 7476

The other parties to these cases have made voluminous submissions to the Court. These submissions contain much information that is irrelevant to the issues before this Court and many issues over which this Court lacks jurisdiction. Respondent desires to simplify the issues before the Court by addressing each of the jurisdictional elements contained in § 7476.

1. Issues of Qualification

This Court has jurisdiction pursuant to § 7476(a) to make a declaration in the case of an actual controversy concerning the Commissioner's determination with respect to the initial or continuing qualification of a retirement plan, or concerning a controversy over the Commissioner's failure to make a determination concerning initial or continuing qualification (providing the controversy arises from a plan amendment or termination). In general, each of the cases before this Court concerns the qualification under § 401(a) of the Brewery Fund or the Teamsters Fund, or both, as those funds existed at particular points in time.

This Court has jurisdiction, pursuant to § 7476, over only those issues that bear on the qualification of those retirement

plans. As the Court has stated in prior cases involving these parties,⁴

[s]ection 7476 is not a broad grant of jurisdiction to the Tax Court to conduct a review of factual matters related to controversies over retirement plans and to fashion equitable remedies to resolve these controversies. * * * The limited jurisdiction of this Court is succinctly described in the legislative history concerning section 7476 as follows: "The Tax Court is to have jurisdiction to declare whether a plan is, or is not, a qualified plan * * *. [S. Rept. 93-383(1973) 1974-3 C.B. (Supp.) 80,193.]"

Wenzel supra, 44 TCM (CCH) at 1378. *See, also, Wenzel*, 707 F.2d at 696. In general, this Court has made clear in the prior cases that the Court lacks jurisdiction over certain categories of claims. For example, the sufficiency of the Brewery Fund's funding under § 412 is not a qualification issue. *Wenzel*, 44 T.C.M. (CCH) at 1379. Also, the Court does not have jurisdiction over claims of procedural irregularities other than in connection with the procedures set out in § 7476(b). *Wenzel*, 707 F.2d at 696. *See, also, Mosley*, 44 T.C.M. (CCH) at 1370. *Hawes v. Commissioner*, 73 T.C. 916 (1980).⁵

⁴*Wenzel, et al. v. Commissioner, et al.*, T.C.M. 1982-595, *affirmed per curiam*, 707 F.2d 694 (2d Cir. 1983); *New York State Teamsters Conference, Pension & Retirement Fund, et al. v. Commissioner, et al.*, T.C.M. 1982-593 (hereinafter "*Teamsters*"); and *New York State Teamsters Conference Pension & Retirement Fund, et al. v. Commissioner, et al.*, T.C.M. 1982-594 (hereinafter "*Mosley*").

⁵Respondent notes at this point the Affidavit of Eugene A. Moran which was submitted by the Teamsters Fund together with its Memorandum in Opposition. Respondent questions Mr. Moran's qualifications as an expert concerning the proper procedures, statutes, and Tax Court rules relating to employee plans. *Compare, e.g.*, Mr. Moran's assertions concerning what should be in an administrative record (Affidavit at p. 50) with Proc. Reg. § 601.201(o)(8) and Rule. 210(b)(11) of the Tax Court Rules of Practice and Procedure (hereinafter "*T.C. Rule*"). Moreover, Mr.

In docket nos. 12440-85“R” through 12444-85“R”, the petitioners request the Court to make a declaration concerning whether the partial termination of the Brewery Fund resulted in its disqualification, whether a disqualified Brewery-Fund could merge with the Teamsters Fund and have the merged Funds be qualified, and whether the merger resulted in the termination and disqualification of the Brewery Fund. Each of those issues involves in some manner the qualification of the Brewery Fund and, by implication, the Teamsters Fund. They are qualification issues raised in the application and answered in the technical advice memorandum and thus are properly subject to the jurisdiction of this Court under § 7476.

However, the Court lacks jurisdiction over the final claim for relief in these petitions. The petitioners request that if the Court finds that the Brewery Fund was not qualified the Court declare that the September 28, 1976 determination letter is erroneous and must be revoked retroactively. The Court’s jurisdiction in this case is based on the determination letter issued February 12, 1985, not on the determination letter issued September 28, 1976. Obviously, any judgment action based on the 1976 letter would be outside the ninety-one day period in which to bring such an action under § 7476(b)(5). *See, infra*, p. 25. As the Second Circuit stated in the prior cases:

[t]he Tax Court is restricted to deciding “whether the Commissioner, in making his determination, properly applied the law to the facts presented to him

Moran’s often incorrect legal assumptions about employee benefit law bring into question many of the allegedly expert conclusions he states. In any event, in light of the jurisdiction of this Court, as discussed earlier in *Wenzel*, the affidavit’s allegations are clearly and legally irrelevant to the substantive and jurisdictional issues before this Court.

in the request for such determination." *Thompson v. Commissioner*, 71 T.C. 32, 36-37 (1978).

Wenzel, 707 F.2d 696 (2d Cir. 1983). The issue before this Court is whether in the February 12, 1985 determination letter the Commissioner correctly applied the law to the facts presented to him in the 1983 request for determination. This Court does not have jurisdiction to decide whether in the September 28, 1976 determination letter the Commissioner correctly applied the law to the facts presented to him in the 1976 request for determination. Even if these petitions were timely in connection with the 1976 determination letter, which they were not, the Court cannot review the letter based upon information submitted to the Commission after the 1976 letter was issued. *Mosley*, 44 T.C.M. (CCH) at 1371.

The petitioners' prayer for relief erroneously assumes that if the Court finds that the Commissioner was incorrect in applying the law to the facts presented for the 1985 letter the Commissioner was necessarily incorrect in applying the law to the facts presented for the 1976 letter.⁶ Therefore, this Court lacks jurisdiction over whether the 1976 letter is correct or erroneous.

The petitioners in consolidated docket nos. 12445-85 "R" through 12449-85 "R" make a number of requests for relief, including the same claims for relief as those described above, to which the same jurisdictional analysis applies. In addition, these petitioners request the Court to find that the merger of the two Funds was not an amendment qualified under § 401(a) because the Brewery Fund was insolvent, partially terminated and disqualified and could not be merged with the

⁶The petitioners' preoccupation with the 1976 letter is hard to understand because if the Court determines the qualification issues in their favor, the 1976 letter is without legal significance in the face of the Court's decision.

Fund. This request contains both qualification issues and issues unrelated to qualification. Whether the Brewery Fund suffered a partial termination is a qualification issue; whether it was insolvent is not. *See, supra*, p. 8. Whether a disqualified plan as a matter of law or contract can merge with a qualified plan is not by itself a qualification issue; whether the resulting merged plan can qualify under § 401(a) is a qualification issue.

In this claim as well as others discussed, *infra*, petitioners refer to the merger as a "qualifying amendment". A plan may be qualified, then an amendment made or proposed, and the Commissioner might consider whether the plan with the amendment would still be qualified. Whether the amended plan remains qualified can be analyzed under § 401(a) and the issue is subject to the Court's jurisdiction under § 7476. There is no relationship for purposes of § 7476 between whether the amendment causes the plan to no longer be qualified and whether as a matter of the contract terms or contract law the amendment remains in effect. Although the terms of a contract, such as a merger agreement between two unions, might condition its enforceability on the tax qualification of one or both plans, the enforceability of the amendment is an issue in which respondent has no interest and over which the Court has no jurisdiction under § 7476. *See Wenzel*, 44 T.C.M. (CCH) at 1379; *Teamsters*, 44 T.C.M. (CCH) at 1364-65.

These petitioners also request the Court to find that the merger was not "a qualified amendment" under § 401(a) because it caused the Teamsters Fund to breach the exclusive benefit and non-diversion provisions of § 401(a)(2). Clearly, the breach of those provisions would affect the qualification of the Teamsters Fund, and therefore those issues were addressed in the Commissioner's technical advice memorandum. However, the *effect* of such a determination concerning those issues on the enforceability, or validity, of the amendment is

outside the scope of this case. That issue is one solely between the two Funds, and one in which the respondent and this Court have no interest in considering and over which the Court has no jurisdiction.

In addition, these plaintiffs request the Court to find that the merger was not "a qualified amendment" because the merged Funds could not provide systematically for the payment of definitely determinable benefits for covered participants for life after retirement and because the merged Funds did not constitute a permanent program due to the financial condition of the Funds as merged. Whether a plan provides for definitely determinable benefits in accordance with an express formula in the plan is a qualification issue. To be qualified a plan must constitute a permanent program; however, the petitioners did not raise this qualification issue during the administrative process and accordingly, they have not exhausted their administrative remedies as to this issue. *See, infra*, p. 24. Therefore this Court lacks jurisdiction over that issue (pursuant to § 7476(b)(3)).

Finally, these petitioners request the Court to find that the Commissioner abused his discretion and acted arbitrarily and unreasonably in issuing the September 28, 1976 determination letter and in failing to make those determinations in the February 12, 1985 determination letter that had been requested by petitioners in 1983. As discussed, *supra*, this Court lacks jurisdiction over the 1976 determination letter. The Court has jurisdiction over the 1985 determination letter to the extent discussed herein.

2. Determination as to Qualification: 7476(a)

Unlike the prior cases involving these parties in which no reviewable determination had been made,⁷ the Commissioner

⁷*Wenzel*, 44 T.C.C. (CCH) at 1381; *Teamsters*, 44 T.C.M. (CCH) at 1366; and *Mosley*, 44 T.C.M. (CCH) at 1372-73.

issued a determination letter dated February 12, 1985 in response to an application dated September 30, 1983. Thus these cases are based at least in part on a determination within the meaning of § 7476(a)(1). As can be seen by a comparison of the requested determinations in the 1983 application and the actual determinations in the technical advice memorandum and resulting 1985 determination letter, the Commissioner responded to each of the qualification issues raised by the application. The Commissioner's silence as to certain issues raised during the administrative process is attributable to the issues being either unrelated to qualification under § 401(a), or irrelevant in light of the Commissioner's other determinations. Whether the Commissioner made a determination, within the meaning of § 7476(a)(1), or failed to make a determination, within the meaning of § 7476(a)(2), respondent believes that any alleged failure to rule on a particular issue does not by itself deprive this Court of jurisdiction.

Thus to the extent that the issue is a "qualification issue" presented in the 1983 request (as discussed in part 1), and there exists a case or controversy (as discussed in part 3), this Court has jurisdiction to redetermine the matter under § 7476(a).

3. Case or Controversy: § 7476(a)

One question that has been raised is whether the passage of time or merger of the Brewery Fund means that the relief sought in the petitions is beyond the jurisdiction of the Court. As mentioned in the technical advice memorandum, the procedures established to handle the consideration and issuance of determination letters contemplate that applications for determination letters will be filed promptly in relation with the relevant events. This is usually done by plan sponsors to obtain promptly that reliance to which a favorable determination let-

ter would entitle them. Respondent's research has unearthed no statutory, regulatory, or procedural time limit on the filing of applications.⁸ Thus, a plan that has been in existence for 10 years would not be precluded today from submitting an application for a determination as to its qualified status from its inception. Likewise, nothing precludes a sponsor of a terminated plan from applying for a determination that it was qualified at the time of termination, although the Court might wish to be assured that there still existed some tax consequences.⁹ While § 7476(b)(4) requires that the plan and/or amendment with respect to which the action is maintained, have been put into effect for the Court to have jurisdiction, there is no requirement that the plan concerning which the declaratory judgment is sought still be in existence at the time the petition is filed. *See, infra*, p. 25. Of course, the Court could consider whether the qualification issues raised in a petition are moot. *See* fn. 9.

Another issue is raised by the unusual stances of the parties in this case; that is, whether these various petitioners may challenge a "favorable" determination letter. Ordinarily, a plan sponsor brings an action under § 7476 for a declaratory judgment that its employee plan is qualified after

⁸This is true even though delay may mean that certain relief may be unavailable should the plan be shown to be nonqualified. *See, e.g.*, § 401(b); *Jack R. Mendenhall Corp. v. Commissioner*, 68 T.C. 676 (1977); and *Aero Rental v. Commissioner*, 64 T.C. 331 (1975).

⁹Because the favorable tax treatment for distributions to participants depends on the qualification status of the plan at the time of distribution, *Baetens v. Commissioner*, 777 F.2d 1160 (6th Cir. 1985); *Cass v. Commissioner*, 774 F.2d 740 (7th Cir. 1985); *Woodson v. Commissioner*, 651 F.2d 1094 (5th Cir. 1981); *Cf.*, *Greenwald v. Commissioner*, 366 F.2d 538 (2d Cir. 1966), the delayed determination that the plan was not qualified upon termination could affect many subsequent tax years of individuals who, for example, rolled the distribution into another plan or elected income averaging.

the Commissioner has determined that it is not, or was not, qualified under § 401(a). Sometimes the sponsor will bring an action concerning a favorable letter that is conditioned on certain subsequent action that the sponsor does not believe is necessary for the plan to be qualified. See, *Celanese Corporation of America v. Commissioner*, Docket No. 10867-84 "R" (1985) (conditioned on obtaining approval of change in funding method; dismissed after condition met); *Arthur Sack, Pension Paperwork, Inc. v. Commissioner*, 82 T.C. 741 (1984) (conditioned on execution of proposed amendments). Also, participants who believe that they are wronged by the plan's terms or operation, sometimes may sue the Commissioner concerning an unconditional favorable letter issued to the plan sponsor. *Thompson v. Commissioner*, 71 T.C. 32 (1978). While superficially it would appear to be in the best interests of a participant to have the plan be qualified, in particular situations the participant's interests may be quite adverse to having the plan be approved as submitted. A participant might receive more or better benefits if the plan sponsor was forced to amend the plan or administer it differently. See, e.g., *Thompson, supra*.

Thus, while a determination letter may call itself favorable, respondent believes that actual controversies could arise between the Commissioner and a particular plaintiff for whom the Commissioner's determination has adverse consequences. In *Thompson v. Commissioner*, 71 T.C. at 39, this Court adopted for this analysis the actual controversy standard articulated in *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941):

Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient im-

mediacy and reality to warrant the issuance of a declaratory judgment.***

Congress intended that the declaratory judgment remedy be available where the Commissioner "has issued a determination as to the status of the plan which is adverse to the party petitioning in the Tax Court. . ." Conf. Rept. 1280 at p. 331, 93d Cong. 2d Sess., 1974-3 C.B. 492. This includes a determination that is adverse to an employee-petitioner, provided that the petitioner was an employee at the time for which he is questioning the qualification of the plan.

In the case at hand, the petitioners who submitted the 1983 application requested that the Commissioner determine that the Brewery Fund was not a qualified plan, for various reasons, and that the Teamsters Fund not be determined to be non-qualified, either by virtue of the legal effect of the merger or through an exercise of the Commissioner's discretion under § 7805(b). The Commissioner's determination letter issued February 12, 1985, did not make the requested determinations. To the extent that the qualified status of the Brewery Fund has an identifiable adverse effect on Teamsters Fund participants, the Teamsters Fund participants arguably may characterize their interests as adverse. The Commissioner's determination that the Brewery Fund was qualified does not adversely affect the qualified status of the Teamsters Fund, although it may be adverse to the interests of the petitioners in light of the terms and/or operation of the Funds.

A plan administrator of the Teamsters, attempting to proceed in the best interests of Teamster participants, could characterize the favorable determination as adverse to those participants and, as administrator, seek to have the Commissioner's determination declared incorrect. *See* docket no. 12445-85 "R". That position raises questions of conflict of interest as the same plan administrator functions as successor

trustee for the Brewery Fund so respondent moved to join the Brewery Fund trustees in order to have the allegedly different interests of the Brewery Fund participants represented by someone other than the Teamsters Fund trustees.

As to the Brewery Fund itself, docket no. 12441-85“R”, the application requested that the Commissioner determine that the Brewery Fund was not qualified. In one sense, the Commissioner’s favorable determination is adverse to the interests of the Brewery Fund as expressed by its successor trustees and plan administrators. Although respondent does not understand at this juncture what possible advantage there would be to the Brewery Fund and its participants to be disqualified, which would imply that no adverse interest exists to create a case or controversy, respondent sees no cause to delve, or advantage in delving, into subtle motives or the fiduciary duties of the successor trustees. It is sufficient for these purposes, that the Commissioner did not give the successor trustees and plan administrators of the Brewery Fund the determination requested in the application. Therefore, there is a case or controversy present as required by § 7476(a).

4. Petitioner: § 7476(b)(1)

A pleading may be filed under § 7476(b)(1) by the employer, the plan administrator, an employee who has qualified under the Secretary’s regulations as an interested party, or the Pension Benefit Guaranty Corporation. Individual petitioners, Dennis Loftus (12440-85“R”), Lawrence Wheat (12442-85“R”), William Pryzlucki (12443-85“R”) and Earl LeClair (1244-85“R”), are participants in the Teamsters Fund. Along with the Brewery Fund, by its successor trustees and administrators (12441-85“R”), these petitioners request the Court to find that the partial termination of the Brewery Fund resulted

in its disqualification, that the disqualified Brewery Fund could not merge for Federal tax purposes with the qualified Teamsters Fund and have the merged Funds be qualified, and that for federal tax purposes the merger of the Brewery Fund with the Teamsters Fund resulted in the termination and disqualification of the Brewery Fund. The individuals, as participants in the merged Funds of the Teamsters Fund and the Brewery Fund, have an interest in the issue of the Brewery Fund's qualification and the effect that that determination may have upon their benefits.¹⁰ Clearly the successor plan administrator of the Brewery Fund is an eligible petitioner under § 7476(b)(1).

The petitioners in the other consolidated dockets are the Teamsters Fund trustees and administrators (12445-85"R") and various Teamsters Fund participants: Peter DeMarco (12446-85"R"), Richard Carbano (12447-85"R"), Richard Wisnoski (12448-85"R"), and Paul Litwin (12449-85"R"). These petitioners make the same claims as in the first consolidated group of cases and in addition claim, *inter alia*, that the Commissioner never issued a separate determination letter to the Teamsters Fund, as requested, that the determination letter does not answer all the issues raised in the 1983 application, that the Brewery Fund's merger with the Teamsters Fund was not a qualified amendment under § 401(a) for various reasons, that the Brewery Fund was not qualified and could not merge with the Teamsters Fund, and that the merged Funds could not meet the requirements of § 401(a). These individuals are participants in the merged Funds and thus have an interest in the effect that these various issues may have on their interests in the Teamsters Fund and/or merged

¹⁰In connection with the 1983 application, the Teamsters Fund participants were given proper notice pursuant to § 7476(b)(2) due to their clear interest in the qualification of the Funds and the effect on their benefits under the merged Funds. *compare Teamsters*, 44 T.C.M. (CCH) at 1360.

Funds. The Teamsters Fund trustees and administrators have standing as the qualification of the Teamsters Fund and of the merged plans is either addressed by these cases or affected by their outcome.

5. Notice: § 7476(b)(2)

Unlike the earlier cases concerning these plans, notice was given to both Teamsters Fund and Brewery Fund participants in accordance with § 7476(b)(2). *See, supra*, fn. 10.

6. Exhaustion of Administrative Remedies: § 7476(b)(3)

In general, the petitioners in docket no. 12441-85“R” (Brewery Fund), and 12445-85“R” (Teamsters Fund) have exhausted their administrative remedies as joint applicants, and the individual petitioners have exhausted their administrative remedies by the submission of a joint comment letter dated November 14, 1983. (Attached hereto as respondent’s Exhibit 1.) However, the petitioners have not exhausted their administrative remedies as to one of the claims for relief in docket nos. 12445-85“R” through 12449-85“R”. Those petitioners request the Court to find that the merged Funds could not be qualified because the merged Fund’s financial situation due to the merger prevented it from being a “permanent program”. This ground for disqualification was not raised in the applicants’ letter dated September 30, 1983, nor in the interested party comment submitted November 14, 1983. Accordingly, the Court lacks jurisdiction over that claim. This Court has long held that petitioners cannot raise issues during a declaratory judgment action which were not raised during the administrative process. *Thompson v. Commissioner*, 71 T.C. 32, 36 (1978). As the Second Circuit noted in the prior cases, the Tax Court will not consider issues not raised before the Commissioner. *Wenzel*, 707 F.2d at 696. *See, also*,

Jones v. Commissioner, T.C.M. 1980-512, *affirmed*, 676 F.2d 710 (9th Cir. 1982); and *Tamko Asphalt Products, Inc. v. Commissioner*, 658 F.2d 735, 738-39 (10th Cir. 1981). Note that in *Wenzel* the Court assumed that the petitioner's comments had raised all the issues raised in the petitions. *Wenzel*, 44 T.C.M. (CCH) at 1378.

7. Plan Put in Effect: §7476(b)(4)

Subparagraph (b)(4) of § 7476 requires that the plan, or relevant amendment, about which the case is being brought has been put in effect before the filing of the pleading. The Brewery Fund clearly had been in effect; the statute does not require that the plan still be in effect when the pleading was filed. *See, supra*, p. 17. The Teamsters Fund had been in effect. The merged Funds had been declared to be in effect as of December 1, 1976 by order of the New York Supreme Court, Queens County.

8. Time for Bringing Action: § 7476(b)(5)

As stated herein, *supra*, the petitions filed on May 13, 1985 were timely filed in as much as they relate to the Commissioner's determination letter dated February 12, 1985. The petitions are not timely filed in as much as they make claims for relief concerning the Commissioner's determination letter dated September 28, 1976.

For the reasons stated herein, respondent asserts that this Court has jurisdiction over each of the 10 petitions but the Court lacks jurisdiction over certain of petitioners' claims for one or more of the following reasons: the claims are not issues of tax qualification, the petitioners have not exhausted their administrative remedies by raising the issue during the administrative process, or the claims relate to a prior determination letter for which these petitions were not timely filed.

WHEREFORE, respondent requests the Court to strike certain of petitioners' claims as identified herein, but in all other respects, rule that it does have jurisdiction over the petitions filed in these cases.

WILLIAM F. NELSON
Chief Counsel

By: /s/ Sarah A. Hall
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Internal Revenue Service**EXHIBIT B**

District Department of the Treasury
Director P.O. Box 421, Niagara Sq. Sta., Buffalo, NY
 14321

Date: FEB 12 1985

Person to Contact: Barbara DeMarco
Telephone Number: (716) 846-5383
Case Serial Number: 16328001EP
File Number: 160010749
Name of Plan: Brewery Workers Pension Plan
Form Number: 5303
EIN: 11-1619527
Plan Number: 001

Board of Trustees of New York State
Teamsters Conference, Pension &
Retirement Fund
(As successor Trustees of the Brewery
Workers Pension Fund)
7 Rutger Park
Utica, NY 10178

Dear Sir:

Based on the information supplied, we have made a favorable determination regarding the qualification of the Brewery Workers Pension Plan in effect prior to the merger into the New York State Teamsters Conference Pension and Retirement Fund.

This letter also concerns your request for a determination as to whether a partial termination of the Brewery Workers Pension Plan occurred within the meaning of section 411(d)(3) of the Internal Revenue Code and the regulations thereunder between January 1, 1976 and September 30, 1976, prior to the effective date of the merger agreement of the Brewery Fund into the New York State Teamsters Conference Pension and Retirement Fund.

Based on the facts submitted, we have determined that a partial termination of the Brewery Workers Pension Fund occurred between January 1, 1976, and September 30, 1976, and before the December 1, 1976, date on which the court said the two plans were fully integrated. Even though a partial termination of the Brewery Workers plan occurred, it required no additional vesting and had no effect on the qualification of the plan due to the fact participants were fully vested in their accrued benefits to the extent funded, at the time of the partial termination.

This letter relates only to the status of your plan under the Internal Revenue Code. It is not a determination regarding the effect of other Federal or local statutes.

If you have any questions, please contact the person whose name and number are shown above.

Sincerely yours,

/s/ J.J. Jennings
John J. Jennings
District Director

Enclosures: LSMA 645
Publication 794

cc: Mr. Robert D. Whoriskey
Curtis Mallet-Prevost, Colt and Mosle
101 Park Avenue 35th Floor
New York, NY 10178
